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No. 94-1244

In The

Supreme Court of the United States

October Term, 1994

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
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DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF, EOD JANUARY 28, 1992

No. 89-56265

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF
SAN FRANCISCO, Et. Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-56265

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF
SAN FRANCISCO, Et Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR FEDERAL APPELLANT BEHRENS

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. 1331. The district court's denial of the motion to substitute the United States as defendant, as required by

the Federal Employees Liability and Tort Reform Compensation Act of 1988, and the district court's denial of qualified immunity, are, we assert, interlocutory orders appealable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). See, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

This Supplemental Brief is being filed pursuant to the Court's order of January 6, 1992.

QUESTIONS PRESENTED

1. Whether the denial of a motion to dismiss based on qualified immunity claim is immediately appealable in the Ninth Circuit under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

2. Whether the denial of a request for substitution of the United States as defendant under the Reform Act is immediately appealable under *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

FACTUAL BACKGROUND

1. The defendant-appellant John Behrens, a Supervisory Agent of the Federal Home Loan Bank Board, was sued by the plaintiff who asserted, *inter alia*, a *Bivens* cause of action for the alleged commission of constitutional torts, and a cause of action for the alleged commission of common law torts.

The district court declined to dismiss the *Bivens* count and also declined to grant defendant's motion for qualified immunity. The court also appeared to deny

defendant's motion seeking substitution of the United States on the common law counts, as required by the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Reform Act").

The defendant then appealed the lower court's immunity rulings to the Ninth Circuit.

2. The appeal was duly briefed, and was argued before a panel of the Court on April 4, 1991. However, on May 2, 1991, the panel remanded the case to the United States District Court for the Central District of California "for the limited purpose of enabling the district court to advise us if a ruling [on the substitution issue] has been made, and if so, the nature of its ruling." If no ruling had been made, the district court was instructed to rule on the issue. On July 24, 1991, submission of the appeal was vacated "pending order of the Court."

3. On July 29, 1991, the district court entered an order stating that it had not ruled on the substitution issue, and requiring further briefing on that issue.

Thereafter, on October 8, 1991, the district court issued a second order, one that addressed the substitution issue. The lower court ruled that the federal defendant, John Behrens, was not acting with the scope of his employment at the time the alleged acts occurred. Accordingly, the court held that there could be no substitution of the United States as defendant under the Reform Act.

4. After the purpose of the limited remand to the district court had been met, this Court, by order of

January 6, 1992, reinstated the appeal and requested supplemental briefs from the parties on two issues: "whether denial of a motion to dismiss based on qualified immunity is immediately appealable in this circuit under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and whether denial of a request for substitution under the FELRTCA is likewise immediately appealable."

This Supplemental Brief responds to the Court's January 6, 1992 order.

ARGUMENT[1]

I.

IN THE NINTH CIRCUIT, DENIALS OF MOTIONS TO DISMISS BASED ON QUALIFIED IMMUNITY ARE IMMEDIATELY APPEALABLE.

This Court has asked for supplemental briefs on the question whether interlocutory appeals from denials of qualified immunity may be taken at the motion to dismiss stage. This question suggests that while such interlocutory appeals may be taken at the summary judgment stage, (see, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987)), it is questionable whether appeals may be taken at an earlier stage of the proceedings. We demonstrate below that, under the law of this Circuit and the law of the Supreme Court, official immunity issues must be decided at the earliest possible stage of the proceedings; and that,

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[1] The two issues addressed in this Supplemental Brief are issues of law reviewable *de novo*. See, *Baker v. Racansky*, 887 F.2d 183, 185 (9th Cir. 1989); *Maraziti v. First Interstate Bank*, No. 90-56001 (9th Cir., Jan. 3, 1992) (Slip op. at 27-28).

accordingly, when a motion to dismiss based on qualified (or absolute) immunity is denied, an immediate interlocutory appeal from that denial may be taken to this Court.

A. In this Circuit, as in the other circuits,[2] denials of motions to dismiss based on qualified immunity are appealable interlocutory orders. This Court, in *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991), recognized this principle. The Court wrote:

> Although an order denying a motion to dismiss is not a "final decision" as that term is ordinarily used in 28 U.S.C. 1291, the denial of a claim to qualified immunity is appealable under the collateral order doctrine recognized in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), notwithstanding the absence of a final judgment.

Similarly, in *Compania Mexicana De Aviacion v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988), the Court observed that

> A denial of a motion to dismiss based on a claim of absolute or qualified immunity is an appealable interlocutory order to the extent that it turns on an issue of law. The entitlement is an immunity from suit rather than a mere defense to liability; it is effectively lost is a case is erroneously permitted to go to trial.

In *Schlegel v. Bebout*, 831 F.2d 881 (9th Cir. 1987), the Court held that a denial of a motion to dismiss based on immunity was immediately appealable. And in *Lutz v. Secretary*

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[2] See, *e.g.*, *Schrob v. Catterson*, 948 F.2d 1402 (3d Cir. 1991); *Williams v. Brooks*, 945 F.2d 1322 (5th Cir. 1991).

of the Air Force, 944 F.2d 1477 (1991), this Court ruled that it had jurisdiction to hear an interlocutory appeal from a motion to dismiss based on the *Feres* doctrine. In upholding its jurisdiction, the Court reasoned that the *Feres* doctrine was similar to the doctrine of official immunity, and that because the Supreme Court in *Mitchell v. Forsyth* had ruled that such denials of immunity were immediately appealable, the denial of a motion to dismiss based on *Feres* was immediately appealable as well. The law of the circuit, accordingly, is well-established, and supports the interlocutory appeal of qualified immunity in this case. See, also *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989) (district court's denial of Guam's motion to dismiss on immunity grounds is immediately appealable.

B. These holdings of the Ninth Circuit are consistent with the holdings of the Supreme Court. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Supreme Court held that a claim of qualified immunity should be heard at the earliest possible stage in the litigation, and that denials of qualified immunity were appealable at both the motion to dismiss and summary judgment stage. 472 U.S. at 527. As this Court has explained, the Supreme Court in *Mitchell* "held that the denial of a motion to dismiss or for summary judgment based on qualified immunity is a collateral order, appealable under *Cohen*." See, *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987).

C. There can be no doubt, in sum, that under the law of the Supreme Court and the law of the Ninth Circuit a district court's denial of a motion to dismiss based on qualified immunity is an appealable order. While the Supreme Court in *Mitchell* held that a district

court's denial of a claim of qualified immunity is appealable "to the extent that it turns on an issue of law," 472 U.S. at 530, this is the classic case where the appeal of the denial of qualified immunity does involve a pure issue of law. Plaintiff's complaint turns on one undisputed document, the letter written by defendant Behrens on behalf of the Federal Home Loan Bank Board advising an applicant financial institution that because of an ongoing FSLIC investigation, "this office is unable at this time to proceed with the application [seeking approval of plaintiff Pelletier as president]." The sole question presented, therefore, is whether in writing this letter a reasonable person would have thought he was violating clearly established law. This is the classic case for a grant of qualified immunity, and a proper case for appealing the district court's failure to grant the motion to dismiss on qualified immunity grounds.[3]

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[3] We note that the Tenth Circuit has concluded that "the Supreme Court's approval of an interlocutory appeal in a fact-specific case like *Anderson* [*v. Creighton*, 483 U.S. 635 (1987)], in which the district court denied a pre-trial qualified immunity defense motion, compels us to take an appeal, we believe, in all cases in which the denial is grounded upon a finding that disputed material facts exist in the case. Our task in such an appeal is * * * to determine whether * * * there exists a conflict sufficiently material to defendants' claim of immunity to require them to stand trial." *DeVargas v. Mason & Hanger-Silas Mason, Co.*, 844 F.2d 714, 719 (10th Cir. 1988). See also, *Stewart v. Donges*, 915 F.2d 572, 575 n.2 (10th Cir. 1990).

II.

THE ORDER DENYING SUBSTITUTION IS IMMEDIATELY APPEALABLE UNDER THE COHEN COLLATERAL ORDER DOCTRINE

A denial of substitution under the Reform Act is also an immediately appealable interlocutory order, because denying substitution denies the defendant absolute immunity from suit.

A. The Federal Employees Liability Reform and Tort Compensation Act of 1988 was enacted by Congress soon after the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). In *Westfall*, the Supreme Court addressed the immunity of federal employees for common law torts arising out of their official actions. Prior to the *Westfall* decision, it was widely understood that federal employees enjoyed absolute immunity from common law tort claims as long as they were acting within the scope of their employment. *See, e.g., Barr v. Matteo*, 360 U.S. 564 (1959) (plurality opinion). In *Westfall*, however, the Supreme Court held for the first time that absolute immunity was not available "unless the challenged conduct is within the outer perimeter of an official's duties *and* is discretionary in nature." 484 U.S. at 300 (emphasis added).

By adding the requirement that a federal employee's actions be "discretionary in nature," the Court significantly restricted the previously recognized scope of absolute immunity for common law torts. At the same time, however, the Supreme Court invited Congress to review by legislation the standard it had adopted. The Court stated that "Congress is in the best position to provide

guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." 484 U.S. at 300. The Court added that "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Ibid.* Within 10 months, Congress responded to the Court's invitation by enacting legislation to overturn the *Westfall* decision. The Reform Act restored the absolute immunity of government employees for acts within the scope of their employment by requiring plaintiffs in such cases to proceed exclusively against the United States under the Federal Tort Claims Act ("FTCA").

The heart of the Reform Act lies in Sections 5 and 6, which amended the FTCA. Section 5 amended 28 U.S.C. § 2679(b) to provide that the FTCA remedy against the United States for negligent or wrongful acts by government employees acting within the scope of their employment "is exclusive of any other civil action or proceeding for money damages * * * against the employee whose act gave rise to the claim * * * ." As a result, in the words of the House Report on the Reform Act, "the availability of suit under the FTCA precludes any other civil action or proceeding of any kind from being brought against an individual Federal employee or his estate if such action or proceeding would sound in common law tort." H.R. Rep. No. 700, 100th Cong., 2d Sess. 5 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News ("USCCAN") 5945, 5949. Congress's purpose in enacting this exclusive-remedy scheme was to render federal employees "immune for personal liability" for actions within the scope of their employment, thereby "return[ing] [them] to the status

they held prior to the *Westfall* decision." *Id.* at 4, 1988 USCCAN at 5947.

B. The history of the Reform Act makes it clear that Congress, by statute, has now given federal employees sued for common law torts absolute immunity from suit – thus "return[ing] [them] to the status they held prior to the *Westfall* decision." *Id.* at 4, 1988 USCCAN at 5947. This conclusion has been reached by the Supreme Court. Writing last term in *United States v. Smith*, 111 S. Ct. 1180 (1991) the Court observed as follows:

> The Liability Reform Act establishes the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall*." 111 S. Ct. 1180, 1183 (1991).

Other courts have recognized that the Reform Act bestows an absolute immunity on federal employees. For instance, in *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990), the Third Circuit held that the primary purpose of the Reform Act was "to return federal employees to the status they held prior to the *Westfall* decision, *that is, a status of absolute immunity for activities within their scope of employment.*" 912 F.2d at 639 (emphasis added), quoting H.R. Rep. No. 100-7000, 100th Cong., 2d Sess., *reprinted in* 1988 USCCAN 5945, 5047. In *Johnson v. Carter*, 939 F.2d 180, 183 n.4 (4th Cir. 1991), the Fourth Circuit observed that in the Reform Act "Congress restored the absolute immunity of government employees for acts within the scope of their employment * * * ."

C. Given that the Reform Act, through the mechanism of substitution of the United States as defendant, is

intended to give federal employees charged with common law torts absolute immunity, it follows that a denial of substitution is immediately appealable. In *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982), the Supreme Court held that an order denying a claim of absolute immunity is immediately appealable under the three-pronged test of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (denials of absolute immunity are immediately appealable under the *Cohen* collateral order doctrine since an official's immunity is not a mere immunity from liability, but an "immunity from suit," which is lost if the case is permitted to proceed to discovery and trial).

D. The federal courts of appeals have viewed denials of substitution under the Reform Act as denials of absolute immunity that are immediately appealable under *Nixon*. See, *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990) (where district court remand order effectively denies employee Reform Act immunity, the order is appealable under *Cohen*); *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990) (district court order declining to rule on scope and remanding to state court appealable); *Yalkut v. Gemignani*, 873 F.2d 31 (2d Cir. 1989) (denial of substitution is an appealable order). As the Second Circuit wrote in *Gemignani*:

> The Reform Act broadened the scope of immunity; now, as long as an official is acting within the scope of his or her employment, the official's tortious actions are protected * * * . The question whether [defendants] * * * were acting within the scope of their employment is not one that is inextricably bound with the merits or facts of this case, and so the denial of immunity is appealable. [873 F.2d at 34]

Moreover, when a denial of substitution occurs, the court is constructively dismissing the United States from the lawsuit, in violation of 28 U.S.C. 2679(d)(2). Such a constructive dismissal also meets the requirements of the *Cohen* collateral order doctrine and is thus immediately appealable.

Clearly, the district order denying substitution under the Reform Act is an order that denies the defendants absolute immunity. As such it is immediately appealable under the *Cohen* collateral order doctrine. Holding that denials of substitution cannot be immediately appealed simply cannot be reconciled with Congress' intention in passing the Reform Act, which was to "establish[] the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall.*" *United States v. Smith,* 111 S. Ct. at 1183.

CONCLUSION

For the foregoing reasons, and the reasons stated in the appellant's opening brief and reply brief, the orders of the district court on qualified immunity and substitution should be reversed.

Respectfully submitted,

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COURT OF APPEALS' ORDER GRANTING STAY, EOD JANUARY 31, 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, v. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants, and JOHN W. BEHRENS, Defendant-Appellant.	No. 89-56265 D.C. No. CV-89-0969-RMT ORDER (Filed Jan. 31, 1992)

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING, Senior U.S. District Court Judge

The proceedings in the district court are stayed pending our resolution of this appeal, No. 89-56265, or until further order of this court.

PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION, EOD FEBRUARY 10, 1992

(Filed Feb. 10, 1992)

Nos. 89-56265 and 92-55023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA D.C. No. CV 89-0969-RMT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-56265 and 92-55023

ROBERT J. PELLETIER,

Plaintiff-Appellee,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA D.C. No. CV 89-0969-RMT

SUPPLEMENTAL BRIEF OF APPELLEE PELLETIER

STATEMENT OF JURISDICTION

Jurisdiction exists in the District Court pursuant to 28 *U.S.C.* § 1331; 5 *U.S.C.* § 552A(g)(1); 5 *U.S.C.* § 702; 12 *U.S.C.* § 1431 and 1437; 28 *U.S.C.* § 2201 and 2202; and pendant jurisdiction.

This supplemental brief is submitted pursuant to this Court's January 6, 1992, order so as to address the issue of jurisdiction in this Court over these interlocutory

appeals. Plaintiff-Appellee Robert J. Pelletier ("Pelletier") asserts that there is no jurisdiction in this Court insofar as Defendant-Appellant John W. Behrens ("Behrens") seeks to have this Court review (i) the denial by the Court below of Behrens' motion to dismiss Claims One and Two (the "Bivens claims") based upon Behrens' purported claim of qualified immunity from those claims and (ii) the denial by the Court below of Behrens' motion to substitute the United States of America in Behrens' place on Claims Five through Eight (the "common law tort claims"). The issue of jurisdiction will be discussed more fully *infra*.

Pelletier asserts that in an interlocutory appeal, this Court's jurisdiction is limited to reviewing a narrow and purely legal issue concerning qualified immunity. That narrow issue would be whether Pelletier has alleged in the complaint a "clearly established right" which was violated by wrongful conduct. *Mitchell vs. Forsyth* (1985) 472 U.S. 511, 527-530 and *Manhattan Beach Police Officers Ass'n vs City of Manhattan Beach* (9th Cir. 1989) 881 F.2d 816, 817-818. Pelletier asserts a lack of jurisdiction because Behrens was not a government employee; and, thus, qualified immunity is not available to Behrens. *F.E. Trotter, Inc. vs. Watkins* (9th Cir. 1989) 869 F.2d 1312, 1318. Further, Behrens does not appear to raise the "clearly established right" issue by this appeal.

Pelletier asserts that there is no jurisdiction to review by interlocutory appeal a denial of a motion to substitute, particularly when the appeal addresses only disputed factual findings by the Court below.

STATEMENT OF ISSUES

Pursuant to this Court's January 6, 1992, order, two issues are properly discussed in the supplemental briefs.

1. Is a denial of a motion to dismiss based on a qualified immunity claim immediately appealable in this circuit under *Mitchell vs. Forsyth* (1985) 472 U.S. 511?

2. Is a denial of a request for substitution of the United States as a defendant under the Westfall Act (28 *U.S.C.* § 2679) immediately appealable in this circuit?

STATEMENT OF THE CASE

This supplemental brief is submitted by Plaintiff and Appellee Robert J. Pelletier ("Pelletier") in response to the supplemental brief of Defendant and Appellant John W. Behrens ("Behrens"). This supplemental brief is limited to issues of jurisdiction in this Court over these interlocutory appeals.

In order to understand the jurisdictional issues presented, it is necessary to understand the claims Pelletier has alleged against Behrens in the Court below.

Pelletier pursued a profession and held employment in the savings and loan industry in various executive capacities for over thirty years and until Behrens commenced the action which continues to cause him to be unable to be employed in that industry even to this day. While it is true that this industry is the subject of much criticism, the problems of this industry are not of Pelletier's causing; and he should not be required to come before this Court as a second class citizen stripped of his Constitutional rights.

In 1980, Pelletier was an officer of Beverly Hills Savings and Loan Association ("BHSL"). He served as the Senior Vice President in charge of the Major Loan Division of BHSL and the Senior Loan Committee until his resignation in March, 1984.

While BHSL was subsequently seized by the FSLIC for insolvency in April, 1985, Pelletier was not the subject of any administrative or legal action at the time Behrens committed the primary acts alleged in the complaint. It also does not appear that Behrens played any role in supervising BHSL, while Pelletier was employed.

Behrens at this time was a salaried employee of the Federal Home Loan Bank of San Francisco (the "Bank"). The Bank is admittedly not a governmental agency; and, thus, Behrens was not then nor at any time alleged in the complaint a government employee. On March 17, 1984, about the time of Pelletier's departure from BHSL, Behrens was appointed an agent of the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC"), both of which were government agencies. The scope of his delegated duties were set forth in 12 *C.F.R.* § 501.11. These delegated duties did not include authority which permitted Behrens to remove savings and loan executives, although FHLBB/FSLIC had such authority by statute. See former 12 *U.S.C.* §§ 1730(g), (h) and (q).

In mid-1984, Pelletier was hired by Equitable Savings and Loan Association of Orange County as its managing officer. Pelletier's employment was approved by both federal and state regulatory agencies. Pelletier performed well in this capacity until he resigned in 1985.

Pelletier was then hired by Pioneer Savings and Loan Association ("Pioneer") of Orange County as its managing officer. Pioneer had received insurance of its accounts from the FSLIC in 1984. Although there was no statutory authority for doing so, the FSLIC purported to require that for the period 1984 through 1987, Pioneer secure approval of any new managing officer by the Principal Supervisory Agent for Eleventh District of the FHLBB and FSLIC. Pioneer did not seek such approval immediately but instead entered into an unconditional written employment contract with Pelletier, who then was immediately appointed as the managing officer. Shortly after this appointment, Pioneer notified the FHLBB of Pelletier's employment and contract; but the FHLBB took no action as a result of this notification for over one year.

Pelletier's work and performance while at Pioneer was well received by not only the federal and state regulatory agencies, but also Pioneer's Board and outside accountants, Peat, Marwick, Mitchell & Company.

In May, 1986, and after Pelletier had served as Pioneer's managing officer for over a year, Behrens, acting outside of his lawful authority and with the knowledge and intent that his acts would destroy Pelletier's career in the industry, wrote a letter to the Pioneer Board (the "Behrens Directive"). Fairly read and as held by the Court below, the Behrens Directive required Pioneer to remove Pelletier as its managing officer. Pioneer complied with this removal directive.

Pelletier sought other employment in the financial institutions area. In connection with employment interviews, Pelletier was compelled to disclose the Behrens

Directive to prospective employers. Each prospective employer declined to hire Pelletier upon learning of and because of the Behrens Directive.

Pelletier administratively sought to have the Behrens Directive retracted by the FHLBB and the FSLIC, who refused to do so and further refused to hold any administrative hearing on the matter.

Pelletier filed this action on February 17, 1989.[1]

Behrens moved to dismiss the complaint or for summary judgment based upon qualified immunity, among other grounds. By order entered October 6, 1989, the Court below denied, in part, the motions and found that the following claims had been stated against Behrens. Certain of the claims, where applicable, seek punitive damages.

A. Claims One and Two insofar as they assert acts subsequent to the Behrens Directive for violations of Constitutional rights to procedural and substantive due process. These are the Bivens claims.

B. Claim Three for injunctive relief for violation of the Administrative Procedures Act, 5 U.S.C. § 701-706.

C. Claim Five for interference with contract under California law.

D. Claims Six and Seven for intentional and negligent infliction of emotional distress for acts subsequent to the Behrens Directive under California law.

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[1] These claims were previously asserted in a third party complaint in a separate action and dismissed pursuant to Rule 14(a) *FRCP.*

E. Claim Eight for negligence under California law.

The Court below denied the motion for summary judgment without prejudice because of the factual issues which required discovery.

Upon remand from this Court, the Court below sought further briefs and evidence on the issue of whether Behrens was acting within the course and scope of his agency relationship when he committed the acts alleged in the complaint. The outcome of such determination would decide whether Behrens was entitled to have the United States substituted in his place as to the common law tort claims. By order entered October 9, 1991, the Court below denied the substitution request finding on the basis of the evidence and authority that:

A. Behrens, in fact, directed Pioneer to *remove* Pelletier from his position as a managing officer;

B. The FHLBB had the Congressionally mandated power to so *remove* Pelletier under a procedure which provided for due process;

C. There is no evidence that the FHLBB ever delegated this power to Behrens or his supervisor; and

D. Therefore, Behrens acted beyond his authority when he *removed* Pelletier as Pioneer's managing officer.

The essence of this order is a finding that Behrens intentionally issued his own unauthorized removal and prohibition order directed against Pelletier and that at that time such an order may only have been issued by the FHLBB under a process which provided Pelletier with due process. See former 12 *U.S.C.* § 1730.

The only issues addressed in this supplemental brief are whether this Court has jurisdiction over the issues raised by Behrens' appeals (i) from the denial of his motion to dismiss Claims One and Two of the complaint based upon a defense of qualified immunity and (ii) from the lower Court's October 9, 1991, denial of Behrens' request to have the United States substituted in his place as to Claims Five through Eight of the complaint.

ARGUMENT

Pelletier asserts that while an interlocutory appeal may be taken from a denial of a motion to dismiss based upon a claim of qualified immunity, Behrens' appeal from the October 6, 1989, order of the Court below does not fall within this limited jurisdiction for two reasons. First, Behrens was admittedly not a governmental employee at the time of the acts alleged in the complaint. Secondly, an appeal may only lie from a legal determination and not on the factual grounds raised in Behrens' appeal.

Pelletier asserts that there is no right to an immediate appeal of a denial of a motion to substitute, particularly when such denial is based upon a factual determination of whether the defendant's conduct was outside or beyond the scope of authority.

QUALIFIED IMMUNITY APPEAL

The United States Supreme Court and this Court have held that there is a narrow review of the issue of qualified immunity in the case of an interlocutory appeal taken before any trial has occurred. *Mitchell vs. Forsyth*

(1985) 472 U.S. 511, 527-530 and *Manhattan Beach Police Officers Ass'n vs. City of Manhattan Beach* (9th Cir. 1989) 881 F.2d 816, 817-818. The defense of qualified immunity is only available to government employees and not private parties. *F.E. Trotter, Inc. vs. Watkins* (9th Cir. 1989) 869 F.2d 1312, 1318.

Any interlocutory jurisdiction was criticized by this Court in both *City of Manhattan Beach, supra,* and *Schwartzman vs. Valenzuela* (9th Cir. 1988) 846 F.2d 1209, 1210. This criticism is based on the view that such interlocutory appeals for the most part are simply frivolous, knee-jerk reactions. Pelletier asserts that such is the case in this appeal.

> As this Court held in *City of Manhattan Beach, supra:* [O]ur task is not to determine whether defendants' conduct actually violated clearly established statutory or constitution rights when the facts are in dispute. Rather the Supreme Court has said that in an interlocutory appeal from a denial of a motion for summary judgment on qualified immunity, our inquiry should be limited to deciding whether the "legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions."

Thus, the only issue which would be reviewed on an interlocutory appeal is the purely legal issue of whether the rights as alleged in the complaint were "clearly established". Factual issues are not properly raised in such an interlocutory appeal.

The Supreme Court in *Mitchell, supra* at 526, discussed the rationale for permitting such interlocutory

appeals as being justified to avoid a federal employee from undergoing discovery if the plaintiff has failed to allege the violation of a "clearly established right". While the *Mitchell* Court further suggested that such an interlocutory appeal could be taken from a denial of a motion to dismiss which tested the complaint allegations, *Mitchell*, in fact, arose on a summary judgment motion.

Earlier decisions suggested that these issues should not be decided on a motion to dismiss. See *Scheuer vs. Rhodes* (1974) 416 U.S. 232, 243, 250; *Morrison vs. Jones* (9th Cir. 1979) 607 F.2d 1269, 1274; *Greenlaw vs. California Department of Benefit Payments* (E.D. Cal. 1976) 413 F.Supp. 420, 426 and *Keker vs. Procunier* (E.D. Cal. 1975) 398 F.Supp. 756, 767.

After the initial briefing in this appeal, this Court decided *Fry vs. Melaragno* (9th Cir. 1991) 939 F.2d 832. In *Fry*, this Court held that there is jurisdiction in this Court to hear an interlocutory appeal from a denial of such a motion to dismiss. *Fry* is the only reported decision of this Court on this point. Most of the decisions concern an interlocutory appeal following a denial of a motion for summary judgment.[2]

Thus, insofar as Behrens' claim to qualified immunity is concerned, the issue is whether Behrens' appeal raises the narrow issues permitted by *Mitchell* and *Fry, supra.*

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[2] Pelletier questions the wisdom of permitting such an interlocutory appeal at the pleading stage because liberal pleading rules should permit a plaintiff to amend to allege a "clearly established right" violation, if one exists.

Pelletier asserts that this appeal does not fall within the narrow range of permissible appeals.

Qualified Immunity is Not Available to Private Parties

The first basis for Pelletier's assertion of lack of jurisdiction in this Court is the fact alleged in the complaint and admitted by Behrens that at the time of the wrongful acts, Behrens was not a government employee. Rather, he was a private party employed by the Bank.

This Court has held that "qualified immunity is not available as a defense to private parties in a Bivens suit" and that "private parties are not entitled to qualified immunity for Bivens claims." *Watkins, supra,* at 1318. This decision is controlling and resolves the only issue conceivably before the Court.

Behrens admits that he is a private party. He admits that he is a salaried employee of the Bank, which itself is not a federal agency. Rather, the Bank is a federally chartered corporation whose stock is owned by its member associations in large part. Indeed and until recently, the Bank derived income with which to pay Behrens' salary from charging its member thrifts for supervision/examination.

This situation only recently changed pursuant to the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 ("FIRREA"), Pub. Law No. 101-73, 101 *Stat.* 183 at § 403 and 722. Thus, it took a recent act of Congress to transfer back to the federal government the supervision of thrifts which to that time had been accomplished by the member home loan banks. Were this issue

to arise today, a qualified immunity defense might be available because all regulators are now government employees.

Behrens claims that his conduct was that of an agent of the FHLBB. A similar claim was presented and rejected by this Court in *Watkins, supra.*

Additionally, the delegation of authority Behrens cites does not support his position. Nothing in the regulations or the FHLBB resolution permitted Behrens to remove a thrift official from his job. That is a power held exclusively by the FHLBB/FSLIC. See the Home Owners Loan Act of 1933, at 12 *U.S.C.* § 1464(d)(4) and § 1730(b), (e) and (g). The Court below so held in its October 9, 1991, denial of substitution order.

As a result, Behrens has failed to demonstrate that he falls within a protected category that may claim qualified immunity. This Court has held that a private party may not assert such a defense to a Bivens claim. The mere fact that a party who is not entitled to a qualified immunity defense asserts such a defense does not provide this Court with jurisdiction over the issue. It is only in those circumstances where the complaint alleges that the defendant was a governmental employee that such an interlocutory appeal is allowed from the denial of a motion to dismiss. Pelletier has alleged the contrary.

Behrens' Appeal Does not Raise Narrow Legal Issues Permitted for Interlocutory Appeal

The bulk of Behrens' supplemental brief is directed to authorities which permit a government employee to take an interlocutory appeal. Behrens' supplemental brief is

strangely silent on the actual issues raised by Behrens in his appeal. The reason is that Behrens essentially concedes that Pelletier has alleged a violation of a "clearly established right". The right allegedly violated by Behrens is Pelletier's constitutionally protected right to private employment free from governmental interference, which right was violated by the Behrens Directive and the continuing refusal to retract same knowing it continuing effect.

Pelletier's constitutional rights were clearly entrenched under federal law and California law long prior to the conduct alleged and are codified by Congress' enactment of a specific statute which must be followed if a financial institution officer is to be removed by the "regulators".

The federal case authority on this issue is best found in the landmark decision of *Greene vs. McElroy* (1959) 360 U.S. 474. The holding is found at page 492, as follows:

> The right to hold specific *private* employment and to follow a chosen profession free from unreasonable government interference comes within the "liberty" and "property" concepts of the Fifth Amendment. . . .

See also *Truax vs. Raich* (1915) 239 U.S. 33; *Merritt vs. Mackey* (9th Cir. 1987) 827 F.2d 1368, 1370 and *United States vs. Briggs* (5th Cir. 1975) 514 F.2d 794, 798.

California courts, as well, have firmly protected citizens from arbitrary governmental threats to their employment and profession. One important case has nearly identical facts. *Endler vs. Schutzbank* (1968) 68 Cal.2d 162. See also *Townsend vs. Los Angeles County*

(1975) 49 Cal.App.3d 263, 267; *New Method Laundry Co. vs. MacCann* (1916) 174 Cal. 26, 31; *Purdy & Fitzpatrick vs. State of California* (1969) 71 Cal.2d 566, 579; *Bautista vs. Jones* (1945) 25 Cal.2d 746, 749; *KGB, Inc. vs. Giannoulas* (1980) 104 Cal.App.3d 844, 849; and *California Constitution, Art 1, § 1.*

The statutory method available to remove Pelletier is found at former 12 *U.S.C.* § 1730. Because Pioneer Savings was a federally insured financial institution, Congress granted to the then FSLIC acting through the FHLBB the right to remove any officer of Pioneer under a procedure which provided due process to the employee affected by the removal.

Nevertheless, it is admitted that no removal action was ever taken by those federal agencies as against Pelletier.

The foregoing authorities were recently *expanded* by the Ninth Circuit, who on September 12, 1991, decided *Meyer vs. Fidelity Savings* (9th Cir. 1991) 944 F.2d 562.[3] *Meyer* concerned a Bivens claim against the FSLIC as a result of a termination of a senior officer of a savings and loan association. *Meyer* came to this Court after a jury trial. *Meyer* is important because it extended the constitutionally protected employment right to employees who were at-will, i.e. did not have a written employment contract such as Pelletier had with Pioneer.

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[3] *Meyer* also resolves adversely to Behrens his assertion that pervasive regulation of the savings and loan industry precludes Pelletier's claims.

The foregoing is the narrow issue which should have been addressed by Behrens in his supplemental brief. However, it is not the issue which is addressed either in the supplemental brief or in any depth in Behrens' underlying briefs. Rather, Behrens attempts to argue that his conduct was reasonable under the circumstances. This is a factual issue which may not be resolved in an interlocutory appeal. It is also an issue which has been resolved against Behrens in the Court below by its October 9, 1991, substitution denial order.

Accordingly, because Behrens is a private party who may not claim qualified immunity and because Behrens does not seek to test whether Pelletier has alleged a violation of a "clearly established right" and because Pelletier has unquestionably alleged a violation of a long established "clearly established right", this Court lacks jurisdiction over Behrens' interlocutory appeal on qualified immunity.

SUBSTITUTION APPEAL

Another issue sought to be raised by Behrens in these appeals is whether the Court below erred in denying his motion to substitute the USA under the Westfall Act. 28 *U.S.C.* § 2679.[4] Pelletier asserts that this Court lacks jurisdiction to decide this issue on an interlocutory appeal. The issue of whether there is any jurisdiction to review

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[4] This is really two appeals in one as Behrens has also filed a Notice of Appeal from the lower Court's October 9, 1991, substitution denial order. This second appeal (No. 92-55023) has been consolidated with the first appeal (No. 89-56265).

by interlocutory appeal a denial of substitution has never been decided by this Court. Pelletier asserts that this Court should not expand such interlocutory appellate jurisdiction. Further, Pelletier asserts that Behrens' appeal seeks a review of factual determinations made by the Court below and that this Court has consistently refused to review factual determinations by interlocutory appeal.

This substitution issue concerns only Pelletier's common law tort claims, certain of which are intentional tort claims. Behrens relies on 28 *U.S.C.* § 2679(d), as revised by Pub. Law 100-694 (the "Westfall Act"). Under the Westfall Act, the Attorney General's designee, which in this case is also Behrens' counsel, may provide a "scope" certification to the effect that in committing the torts alleged, the agent was acting within the course and scope of his agency or employment relationship.

There is very little case authority developed on the Westfall Act. Nevertheless it appears clear that if any employee is acting within the course and scope, then the United States should be substituted in that defendant's place as to all common law torts and thereafter the United States may assert all applicable defenses under the Federal Tort Claims Act. Since many intentional torts are excepted from the Federal Tort Claims Act, substitution usually results in dismissal of those excepted claims. Thus, recovery for those excluded torts will normally only result if the employee/agent is found to have been acting outside or beyond the "scope".

Behrens previously argued to this Court that the mere filing of a "scope" certification by his trial counsel was determinative of this substitution issue. This Court

and most other courts have held to the contrary. In *Meridian Intern. Logistics, Inc. vs. U.S.* (9th Cir. 1991) 939 F.2d 740, 745, this Court held that such a scope certification was subject to *de novo* review by the Court below. There is no reported decision of this Court holding that a denial of such a substitution request by the lower court is immediately appealable.

In *Meridian,* this Court reversed and remanded a lower court's grant of substitution. This Court held that "[w]hether a Government employee was acting within the scope of his employment is a mixed question of law and fact". Normally, this Court only reviews pure questions of law on an interlocutory appeal. Thus, *Meridian* provides no authority to support jurisdiction.

While Behrens cites three decisions from other Circuits to support his claim of immediate appellate jurisdiction, only one of those cases, in fact, provides any support.

Mitchell vs. Carlson (5th Cir. 1990) 896 F.2d 128 provides no support. While *Carlson* did find appellate jurisdiction to review a re-substitution order, that order was effectively a final order in light of the subsequent state court remand order. Moreover, in the Fifth Circuit, the Attorney General's "scope" determination was not then reviewable by the District Court. Thus, *Carlson* is in direct conflict with this Court's *Meridian* decision.

Nasuti vs. Scannell (1st Cir. 1990) 906 F.2d 802 involved a mandamus petition before any consideration was given by the District Court of the "scope" decision. The Circuit Court remanded to the District Court to review the "scope" certification. The direction to the

lower court was to remand the action to state court if the conduct was outside the scope or dismiss the action if the conduct was within the scope. The former order is non-reviewable and the latter is reviewable as a final order. Thus, *Nasuti* is a parallel decision to *Meridian* and provides no guidance to this Court.

The case closest to the point is *Yalkut vs. Gemignani* (2nd Cir. 1989) 873 F.2d 31. This case involved common law tort claims against an IRS revenue agent. The agent moved for summary judgment or, alternatively, dismissal. The lower court's denial was appealed. The Second Circuit considered the matter as a claim for immunity. Of importance is the holding that:

> An interlocutory appeal, however, is available only if the question of immunity does not turn on disputed questions of fact. [Citations omitted.]

Yalkut, at 34.

Thus, it is clear that the issue of interlocutory appellate jurisdiction of a denial of substitution is a matter of first impression in this Court and in most Circuits. At a time when this Court has criticized interlocutory appellate jurisdiction in qualified immunity matters, it seems ill advised for interlocutory appellate jurisdiction to be expanded to substitution issues. Behrens has already sought review in this Court on four occasions noted above. Undoubtedly, when the Court below rules on Behrens' pending summary judgment motion, he will file yet another appeal. Is it really wise to expand jurisdiction to allow Behrens yet another appeal? Nearly every other

appellant before this Court is allowed only one appeal and that is from a final judgment.

Pelletier asserts also that Behrens is attempting by this appeal to seek review of factual findings in the Court below. The lower Court's October 9, 1991, denial of substitution order is a fact based order.

Assuming *arguendo* that a substitution request raises an interlocutory appealable issue similar to an immunity claim, this Court's discussion of its jurisdiction to review immunity issues on interlocutory appeals contained in *Valasquez vs. Senko* (9th Cir. 1987) 813 F.2d 1509 is instructive. Similar to the holding in *Yalkut, supra*, this Court held that an appeal involving a disputed factual issue does not present "a purely legal issue, separable from the merits, as *Mitchell* requires" and dismissed the appeal.

In *Valasquez*, the defendants who were admittedly federal officials, contended that they were entitled to summary judgment because they did not participate in the planning or direction of the raids at issue. They did not claim that the plaintiff had failed to allege a violation of a "clearly established right". This Court dismissed the appeal because the issue was (i) fact based and (ii) inextricably bound up in the underlying claim.

In this case, Pelletier asserts that his constitutionally protected right to employment free of governmental interference was violated by Behrens continuing conduct. Rather, than admitting the conduct as alleged by Pelletier, Behrens asserted in the Court below that his real conduct and motivation was something other than as alleged by Pelletier. Behrens asserts that Pelletier was not really Pioneer's managing officer but merely a designee.

Behrens asserts that Pelletier's written employment agreement was not unconditional but was conditioned upon regulatory approval. Behrens asserts that the Behrens Directive was not a removal directive, but only guidance which Pioneer elected to follow. Finally, Behrens asserts that he was, in fact, given authority to author and deliver the Behrens Directive.

In response to this fact sensitive position which is inextricably wound up on Pelletier's claim, the Court below conducted a factual examination based upon declarations, discovery and exhibits. As a result, the Court below made findings of fact which it stated in its October 9, 1991, order. The findings of fact then led to the lower Court's conclusion of law: "Therefore, Behrens was not acting within the scope of his employment when he ordered Pioneer to remove plaintiff from his position as managing officer."

If this Court should decide to expand its interlocutory appellate jurisdiction in this area, Pelletier respectfully requests that this Court limit any such review to "purely legal issues." Under these circumstances, Pelletier is confident that this Court will nevertheless dismiss Behrens' appeal as it does not raise "purely legal issues" but rather seeks to have this Court conduct its own fact based "scope" examination and disregard the efforts of the Court below which were taken in compliance with this Court's earlier remand order.

PELLETIER SHOULD BE AWARDED ATTORNEYS FEES

Pelletier has been required to spend considerable time in connection with these appeals. In Pelletier's earlier brief, Pelletier requested that this Court award him attorneys fees against Behrens' counsel pursuant to 28 *U.S.C.* § 1927 in the sum of $10,000. As a result of additional time required by this matter, Pelletier raises this request to $15,000. Were Behrens' appeals based upon "purely legal issues", this request would not be made. However, based upon the fact that both appeals improperly attempt to seek review of only factual issues and the fact that Behrens has consistently sought to delay a resolution of this matter on the merits, Pelletier can only conclude that these appeals are a vexatious attempt to harass Pelletier and make it absolutely uneconomic to pursue claims for violation of constitutional rights.

The issues involved in the underlying action are not complex and could easily have been tried and resolved within six months of filing with a minimum of expense to Pelletier. As the matter now stands, Pelletier is not able to try this matter because of these interlocutory appeals and thus is not able to seek compensation for a wrongs which started in May, 1986, and are continuing today.

CONCLUSION

Pelletier asserts that insofar as these two appeals are concerned, this Court lacks subject matter jurisdiction to decide the issues presented by Behrens

With regard to the claim of qualified immunity, the claim is without merit because Behrens was at all relevant

times a private party and not a government employee. Secondly, Behrens' appeal fails to raise the "purely legal issue" of whether Pelletier's complaint alleges a violatic of a "clearly established right" and instead seeks to have this Court resolve disputed factual issues.

With regard to the denial of Behrens' substitution request, jurisdiction is an issue of first impression. Interlocutory appellate jurisdiction should not be expanded. If it is expanded, it should be limited to "purely legal issues". Behrens seeks to have this Court become the trier of fact being dissatisfied with the factual findings of the Court below which led to the inescapable conclusion that Behrens acted beyond the scope of any agency relationship. This Court having previously remanded the matter to the Court below for a determination, should not withhold further review until after a final judgment is rendered.

Behrens has filed two appeals and two stay requests with this Court. He threatens to file a third appeal if his pending summary judgment motion is denied. Throughout the proceedings, Behrens has attempted to bootstrap on a purported claim of qualified immunity to seek interlocutory appellate review of virtually every ruling in the Court below. This Court should put a stop to these tactics, particularly since Behrens was not even a government employee at the time he committed his most grievous torts against Pelletier.

For the foregoing reasons, it is respectfully requested that this Court dismiss both appeals and award Pelletier $15,000 in attorneys fees against Behrens' counsel.

DATED: February 7, 1992

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[Proof Of Service Omitted In Printing]

DEFENDANT/APPELLANT' SUPPLEMENTAL REPLY BRIEF, EOD FEBRUARY 19, 1992

No. 89-56265

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK
OF SAN FRANCISCO, Et. Al.

Defendants,

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

SUPPLEMENTAL REPLY BRIEF FOR FEDERAL APPELLANT BEHRENS

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REGULATIONS:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-56265

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK
OF SAN FRANCISCO, Et Al.,

Defendants,

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

SUPPLEMENTAL REPLY BRIEF FOR FEDERAL APPELLANT BEHRENS

COUNTER STATEMENT OF THE FACTS

We recognize that this Court has confined the supplemental briefs it has ordered to two jurisdictional issues. However, in his supplemental brief, the plaintiff has taken the facts, which are simple and straight-forward, and distorted them to suit his subsequent arguments. We feel obliged to make two factual corrections, in order to aid the Court in its jurisdictional analysis.

A. According to the plaintiff, defendant Behrens, "acting outside his lawful authority and with knowledge and intent that his acts would destroy Pelletier's career in the industry, wrote a letter to the Pioneer Board" "requir[ing] Pioneer to remove Pelletier as its managing officer." (Pl. Supp. Brief at 5).

Plaintiff has erected his entire case upon this one letter. He has urged that the letter required that plaintiff be fired, and that as a result the plaintiff was the victim of common law torts and constitutional torts. He claims in this appeal that the defendant has admitted that he is a private party, and that as a private party he has no immunity from suit – hence no right to an interlocutory appeal.

We note, however, that in a ruling not mentioned by plaintiff, the district court, on October 6, 1989, held that the California one year statute of limitations barred any *Bivens* suit based on the letter that Supervisory Agent Behrens sent to Pioneer, or based upon plaintiff's loss of employment.[1] Thus, the very action that the plaintiff dwells on, and in this Court charges as the principle act of wrongdoing, has been found by the lower court to be time-barred. Since this Court has not been asked by either party to reach the limitations issue (and the Court, in any event, could not reach the issue until final judgment is entered), the sole substantive issue pending on the qualified immunity appeal is whether plaintiff's unsupported allegations of a conspiracy to keep him from finding

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[1] The court also held that certain of plaintiff's tort claims were barred by the statute of limitations.

employment in the financial institutions industry was a sufficient basis on which to deny the defendant's good faith defense of qualified immunity from suit. In other words, while the plaintiff attempts to capture the Court's attention with extravagant claims of wrongdoing arising out of the letter the defendant wrote to Pioneer bank, that letter was not the basis of the lower court's qualified immunity ruling on the motion to dismiss because of the statute of limitations problem.

B. We also take issue with plaintiff's careless and frequent factual assertion that defendant Behrens, by virtue of his letter to Pioneer, "removed" plaintiff Pelletier as president of Pioneer. This constant refrain of the plaintiff is troubling for two reasons.

First, as we have already explained, the district court held that this incident was barred by the statute of limitations. Since the district court did not base its denial of qualified immunity on the letter written to plaintiff by Behrens, and since the statute of limitations issue is not before this Court, plaintiff's dangling of the issue before the Court serves no purpose, except an inflammatory one.

Second, nothing in the record upholds plaintiff's charge that Behrens "removed" Pelletier. All the defendant did, on behalf of the agency, was write a letter to plaintiff's employer, declining to approve or disapprove plaintiff as president of Pioneer until an FSLIC investigation of allegations of his wrongdoing was complete. The defendant did not "remove" plaintiff from his job. The plaintiff's employer, Pioneer, chose to terminate his employment, declining either to put plaintiff in another

position at the bank, or to put his appointment as president on hold, pending the resolution of the investigation of plaintiff. All this is evident from the letter itself, part of the record in the case, and the complaint.

Plaintiff's statement of facts thus serves as a predicate for his subsequent legal arguments; but his factual recitation is misleading.

I.

PLAINTIFF DOES NOT ADDRESS THE RELEVANT NINTH CIRCUIT CASES ON IMMUNITY APPEALS

Plaintiff has declined to acknowledge, let alone address or distinguish, most of the key cases from this Circuit upon which stand for the principle that when a motion to dismiss based on qualified immunity is denied, the case is immediately appealable. Plaintiff does not address *Compania Mexicana De Aviacion v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988), although in that case the Court squarely held that "[a] denial of a motion to dismiss based on a claim of absolute or qualified immunity is an appealable interlocutory order to the extent that it turns on an issue of law. The entitlement is an immunity from suit rather than a mere defense to liability; it is effectively lost is a case is erroneously permitted to go to trial." Plaintiff's brief also fails to address *Schlegel v. Bebout*, 831 F.2d 881 (9th Cir. 1987), *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (1991), or *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989) – cases clearly supporting our position.

On the sole occasion when the plaintiff actually cites one of our cases, he is forced to concede that the case's

holding rejects his position on appealability. Accordingly, plaintiff refers to *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991), and admits that "[i]n *Fry* this Court held that there is jurisdiction in this Court to hear an interlocutory appeal from a denial of a motion to dismiss." (Pl. Supp. Brief at 9).

Time and again this Court, following the Supreme Court's ruling in *Mitchell v. Forsyth*, 472 U.S. 11 (1985), has held that denials of immunity at the motion to dismiss stage are immediately appealable. In *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987), the Court observed that in *Mitchell* the Supreme Court "held that the denial of a motion to dismiss or for summary judgment based on qualified immunity is a collateral order, appealable under *Cohen*." In *Compania Mexicana De Aviacion v. United States Dist. Court*, the Court ruled that "[a] denial of a motion to dismiss based on a claim of absolute or qualified immunity is an appealable interlocutory order to the extent that it turns on an issue of law." In *Schlegel v. Bebout*, 831 F.2d 881 (9th Cir. 1987), the Court held that a denial of a motion to dismiss based on immunity was immediately appealable. In *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (1991), the Court permitted an interlocutory appeal of a denial of *Feres* immunity, analogizing the situation to one where qualified immunity is denied.

For this Court to issue a holding supporting plaintiff's position would be contrary to the law of the Supreme Court and the law of this Circuit. Plaintiff's failure to address most of the key Ninth Circuit cases cited in our brief, and his concession that in *Fry* this Court held that denials of immunity at the motion to

dismiss stage *are appealable* – establish that plaintiff's position on the appealability issue entirely lacks merit.[2]

II.

PLAINTIFF'S CLAIM THAT BEHRENS WAS NOT A FEDERAL EMPLOYEE BUT A PRIVATE PARTY IS SIMPLY A RED HERRING

Plaintiff asserts that defendant Behrens was not acting as a duly appointed agent of the Bank Board, but as a private person, and urges that for this reason Behrens cannot have qualified immunity and there can be no interlocutory appeal. This is difficult to reconcile with plaintiff's concession in his opening merits brief before this Court that "Behrens was appointed an agent of the FHLBB and FSLIC," (Plaintiff's Opening Brief at 6). In any event, the question of Behrens' status is part and parcel of the immunity defense, and a proper issue for the Court to consider on an appeal challenging the denial of qualified immunity. This Court's task on appeal is to

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[2] Plaintiff makes so many misstatements of fact and law in his brief that it is difficult to forgo commenting on them, even given the strict page limitations on briefs set by the Court. Perhaps the most glaring misstatement of law appears at page 13 of Plaintiff's Supplemental Brief. There, in commenting on Behrens immunity defense, plaintiff states that "Behrens attempts to argue that his conduct was reasonable under the circumstances. This is a factual issue which may not be resolved in an interlocutory appeal." If plaintiff is correct that a defendant can not make a reasonableness defense in an interlocutory immunity appeal, then the Supreme Court, this Court, and all other federal courts will have to vacate years of decisions to the contrary. See, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987); *Fry v. Melaragno*, 939 F.2d 832, 838 (9th Cir. 1991).

determine "whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." *Mitchell v. Forsyth*, 472 U.S. at 528 n.9. This Court's review of the immunity issue is *de novo*, and encompasses the question whether the defendant was acting as a federal agent.

The question whether an individual is an employee of the federal government is a matter of federal law. See *Slagle v. United States*, 612 F.2d 1157, 1160 (9th Cir. 1980). The record here indicates that Behrens was a properly appointed Supervisory Agent. Board regulations state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation." 12 C.F.R. 501.10. Bank Board Resolution No. 84-126, (R.E. 19) formally appointed Behrens a Supervisory Agent of the Board. We are at a loss to understand how in these circumstances the plaintiff can continue to argue that Behrens was not a federal employee and not entitled to assert qualified immunity.[3]

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[3] One possible answer to this question is that the plaintiff has confused the question whether Behrens was a federal employee with whether Behrens acted within the scope of his employment. For example, at page 12 of Plaintiff's Supplemental Brief, in the Heart of his argument that Behrens is not a federal employee, plaintiff claims that "Nothing in the regulations or the FHLBB resolution permitted Behrens to remove a thrift official from his job." This statement, in the section of plaintiff's brief dealing with whether Behrens was a federal employee, addresses the quite distinct question whether Behrens was acting within the scope of his employment.

III.

PLAINTIFF'S ARGUMENT, COMMENCING AT PAGE 11 OF HIS BRIEF, VIOLATES THE COURT'S ORDER ON SUPPLEMENTAL BRIEFING

Plaintiff begins this argument by stating that "[t]he bulk of Behrens' supplemental brief is directed to authorities which permit a government employee to take an interlocutory appeal. Behrens' supplemental brief is strangely silent on the issues raised by Behrens in his appeal. The reason is that Behrens essentially concedes that Pelletier has alleged a violation of a "clearly established right." (Pl. Supp. Brief at 11). This kind of rhetoric brings no honor to plaintiff's cause. The reason our supplemental brief was silent on the substantive issues is obvious: this Court did not ask for briefs on those substantive issues, but for briefs on the appealability issues alone.

Plaintiff himself, however, next goes on to argue the substantive issues. On pages 11-14 of his brief, plaintiff addresses matters that go to whether the letter Behrens wrote Pioneer Savings & Loan deprived Pelletier of a property right. This substantive argument is not within the parameters of the Court's order regarding supplemental briefs. Indeed, as noted, these are matters that would not properly be before the Court (because of the statute of limitations problem) even if this Court had required supplemental briefing on the substantive issues.

Accordingly, all of plaintiff's allegations in this section of the argument (pages 11-14) are not in accordance with the Court's briefing order, and the section should be struck.

IV.

THE REFORM ACT SUBSTITUTION RULING IS AN APPEALABLE ORDER

A. Denial of substitution under the Reform Act is immediately appealable under the *Cohen* collateral order doctrine. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court held that in certain classes of cases, allowing an appeal from an interlocutory order comports with the purposes of the final judgment rule. The *Cohen* test has been framed as one involving three factors –

> First, [a trial court] "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on appeal from a final judgment." [*Flanagan v. United States*, 465 U.S. 259 (1984) quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)]

The first prong – the requirement that the trial court order "must conclusively determine the disputed question" – ensures that the matter is ripe for appeal. This prong is easily met here, for the district court, on limited remand from this court, entered an order denying the government's motion for substitution under the Reform Act.

The third prong requires that the trial court order must "be effectively unreviewable on appeal from a final judgment" – ensuring that there is a practical reason for allowing an appeal before entry of final judgment. Here, it is abundantly clear that the district court's decision involves an important right that would be lost irreparably

if review had to await final judgment. Absent an immediate appeal, the individual defendant would have to endure discovery and trial, and would lose the absolute immunity granted by the Reform Act. Even if an appellate court ultimately ruled that denial of substitution was improper, this help would arrive too late, for the defendant would have already lost his entitlement not to stand trial or bear the burdens of pre-trial.

Finally, the appeal is separate and collateral, in the sense that it seeks to vindicate a special immunity from trial analogous to immunities asserted in *Nixon v. Fitzgerald*, 457 U.S. 731 (1981) (absolute immunity from trial for damages); *Abney v. United States*, 431 U.S. 651 (1977) (double jeopardy immunity from second trial); and *Helstoski v. Meanor*, 422 U.S. 447 (1979) (Congressman's immunity from trial for damages). Consequently, defendant's appeal satisfies the second prong of the *Cohen* formula as well.

B. The above-analysis, of course, reinvents the wheel. The Supreme Court has already held, in *Nixon v. Fitzgerald*, that denials of absolute immunity are appealable interlocutory orders, and should be heard by an appellate court at the earliest possible stage. The Court has also held that "[t]he Liability Reform Act establishes the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall.*" *United States v. Smith*, 111 S. Ct. 1180, 1183 (1991). Accord: *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990), *aff'd on other grounds*, 112 S.Ct. 358 (1991); *Johnson v. Carter*, 939 F.2d 180, 183 n.4 (4th Cir. 1991).

Since the Reform Act, by its substitution requirement, confers an absolute immunity on individual defendants,

and since denials of absolute immunity are immediately appealable, it follows that the order in this case, which denies substitution, is properly before the Court on an interlocutory appeal.

CONCLUSION

For the foregoing reasons, and the reasons stated in the appellant's opening brief and reply brief, and opening supplemental brief, the orders of the district court on qualified immunity and substitution should be reversed.[4]

Respectfully submitted,

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[4] Plaintiff is obviously not entitled to an award of attorney's fees; at the very least, the positions put forward by the Department of Justice, as counsel for Behrens, are substantially justified.

DEFENDANT/APPELLANT'S PETITION FOR PANEL REHEARING, EOD AUGUST 12, 1992

Nos. 89-56265, 92-55023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, Et. Al.,

Defendants

and

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PETITION FOR PANEL REHEARING

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JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

PETITION FOR PANEL REHEARING

ISSUES MERITING REHEARING

1. Whether the panel erred by not considering the effect of *Siegert v. Gilley,* 111 S. Ct. 1789 (1991) upon plaintiff's claim that the defendant violated clearly established law.

2. Whether the panel should vacate *dictum* in its decision which purports to establish a new rule for the Ninth Circuit limiting a federal or state defendant to one pre-trial immunity appeal. The panel's language conflicts, *inter alia,* with the Ninth Circuit's earlier decision in *Fry v. Melaragno,* 939 F.2d 832, 835 n. 5 (9th Cir. 1991).

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

A. The defendant, John W. Behrens, was a duly-designated Supervisory Agent of the Federal Home Loan Bank Board (now part of the Office of Thrift Supervision) and the FSLIC. The plaintiff, Robert J. Pelletier, was the president-designate of Pioneer Savings & Loan Association.

Pioneer was required by law to obtain approval of its new president-designate from Supervisory Agent Behrens. This approval was not forthcoming. An FSLIC investigation of the Beverly Hills Savings & Loan Association, where Pelletier had previously been employed as a loan officer and head of the bank's Major Loan Division, turned up wrongdoing at that bank, problems so serious that Agent Behrens on behalf of the Bank Board sent a letter to Pioneer advising that because of the ongoing FSLIC investigation, "this office is unable at this time

to proceed with the application [seeking approval of Pelletier as president]." Further, Behrens advised, "we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills Saving is complete." The letter was on Board stationery and signed by Behrens as "Supervisory Agent" of Pioneer.

Pelletier was subsequently asked by Pioneer to step down as President. He refused. He was then fired by Pioneer.

B. This lawsuit was brought by Pelletier to challenge his dismissal by Pioneer. Named as defendants were the Federal Home Loan Bank of San Francisco, the Bank Board, the United States and Behrens. Counts one and two of the complaint sought damages and equitable relief based upon an alleged deprivation of Pelletier's procedural and substantive due process rights. Other counts were founded upon the APA, the Privacy Act and common law tort theories.

The United States filed an omnibus motion to dismiss, or in the alternative for summary judgment, seeking substitution of the United States for Behrens, insofar as common law torts were alleged, a requirement of the then recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988; dismissal of all other claims; and in any event, a grant of qualified immunity for Behrens.

The district court granted the motion in part. The court dismissed the APA and Privacy Act damage claims against Behrens, and held that the one year state statute

of limitations on *Bivens* claims barred a *Bivens* claim based on the Behrens letter to Pioneer or the act of dismissal itself. The court also held that California's one year statute of limitations barred certain acts alleged to be common law torts. However, the court declined to dismiss the *Bivens* claim, to the extent it rested on acts that were not time-barred – even though no specific acts were alleged. The court also appeared to deny substitution of the United States as defendant on the remaining common law tort counts; and the court denied Behrens qualified immunity.

C. An appeal taken to this Court raised three issues: (1) whether, to the extent the complaint alleged the commission of common law torts, the district court erred by failing to substitute the United States for the individual defendant, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988; (2) whether the special factor of Congress' comprehensive regulation of the thrift industry barred plaintiff's *Bivens* action; (3) whether Behren's motion for qualified immunity should have been granted by the district court.

D. On May 2, 1991, after oral argument, the Court remanded the case to the United States District Court for the Central District of California "for the limited purpose of enabling the district court to advise us if a ruling [on the substitution issue] has been made, and if so, the nature of its ruling."

E. On October 8, 1991, the lower court held that the federal defendant was not acting with the scope of his employment at the time the alleged acts occurred, and that therefore, there could be no substitution of the

United States as defendant under the Reform Act. The district court then set a trial date for plaintiff's claims against the United States and his *Bivens* and common law tort claims against Behrens. After the district court refused to grant a stay pending appeal, a stay was granted by this Court.

F. On January 6, 1992, the Court ordered that the appeal be reinstated.[1] On June 29, 1992, the panel issued its decision on the merits. The panel found that it had jurisdiction over both immunity issues under the *Cohen* collateral order doctrine, and ordered the district court to substitute the United States as defendant on the common law tort counts, as required by the express provisions of the Reform Act.

However, while finding jurisdiction to hear the qualified immunity appeal, the panel, in *dictum*, announced that henceforth, in the Ninth Circuit, one interlocutory appeal, taken either at the motion to dismiss or summary judgment stage, is "all that a government official is entitled to and all that we will entertain." Slip op. at 7476. Thus, "if the district court determines that the defendant's entitlement to qualified immunity is not established at the motion to dismiss stage, he appeals at his peril." *Id.*

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[1] The court also ordered the filing of supplemental briefs on two issues: whether denial of a motion to dismiss based on qualified immunity "is immediately appealable in this circuit" and whether denial of a motion to substitute is immediately appealable. *No supplemental briefing was ordered on the precise issue presented here, and hence the court's reasoning was without the benefit of briefs from the parties.*

The panel then ruled that although the complaint "raises at most nebulous theories of conspiracy * * * that in their current form would be insufficient to survive a motion for summary judgment," the complaint was nonetheless adequate to survive a motion to dismiss. Slip op. 7479-7480.

Moreover, without even mentioning *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), the panel held that, because plaintiff alleged that as a result of the defendant's actions he had been unable to find work in the financial industry, plaintiff had stated a claim for deprivation of a liberty interest.

ARGUMENT

I. THE PANEL ERRED BY FAILING TO APPLY THE HOLDING OF *SIEGERT V. GILLEY*

We respectfully submit that the panel erred when it decided that there was a sustainable charge of a Fifth Amendment violation here, without making any reference to the Supreme Court's seminal decision on this very issue in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991). *Siegert* controls the outcome of this case.

A. In *Siegert v. Gilley*, a clinical psychologist was informed that his employer, a federal hospital, was about to terminate him. Accordingly, he resigned. Later, in a lawsuit, the psychologist urged that a letter subsequently written to a prospective employer by the hospital defamed him, caused him to lose employment, and prevented him from obtaining future employment in his field. While Siegert charged a violation of his Fifth

Amendment liberty interests, and sought damages under a *Bivens* theory, the Supreme Court rejected his plea. The Court held that:

> The statements contained in the letter would undoubtedly damage the reputation of one in his position, and impair his future employment prospects * * * But so long as such damage flows from injury caused by the defendent to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a *Bivens* action. [111 S.Ct. at 1794]

B. The facts of *Siegert* are directly on point here, and the result here should thus be the same as in *Siegert*. Pelletier urges that because of a letter written by Behrens, Pelletier has been unable to find employment in the financial industry. He seeks damages under *Bivens*, premised on this injury to his "liberty." But the *Siegert* court made it clear that such damages, while recoverable under state tort law, are not recoverable under *Bivens*, for no liberty interest is implicated. The panel was thus wrong when it held that plaintiff's complaint stated sufficient facts, when under the motion to dismiss standards, to make out a claim for a due process "liberty" violation. *Siegert* holds that even assuming the facts of Pelletier's complaint to be true, the facts alleged to not rise to the level of a constitutional violation.

The panel clearly failed to consider the holding of the Supreme Court in *Siegert*; for this reason we request that the panel grant rehearing and reconsider the immunity

issue under the guidelines provided by the Supreme Court.[2]

II. THE PANEL SHOULD VACATE ITS DICTUM WHICH PURPORTS TO RESTRICT DEFENDANTS TO ONE PRE-TRIAL IMMUNITY APPEAL

A. The panel's decision contains two pages of discussion proposing a new Ninth Circuit rule limiting governmental defendants to one pre-trial immunity appeal. The discussion is *dictum*. The issue of how many pre-trial appeals a litigant claiming immunity may take was not squarely presented in the case, was never briefed, and was not a subject of discussion at oral argument. We,

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[2] The panel's error, we note, was exacerbated by the standards it employed in assessing the plaintiff's complaint. The panel stated that on a motion to dismiss the court must accept the allegations as true "in their entirety." Actually, the panel was only obliged to accept as true those factual allegations that were well-pled. See, *Miree v. Dekalb County*, 433 U.S. 25, 27 n.2 (1977). Moreover, as this Court has recognized, a pleading which does not present "a short, plain statement respecting the alleged wrongdoings of each [defendant]" satisfies neither the letter nor the spirit of the notice pleading requirements of Rule 8. *Schmidt v. Herrmann*, 614 F.2d 1221, 1223 (9th Cir. 1980). Indeed, even under the liberal standard applicable to actions filed *pro se*, vague and conclusory allegations, such as those raised by the plaintiff, are insufficient to avoid dismissal. In *Richards v. Harper*, 864 F.2d 85, 88 (9th Cir. 1988), the Court held that dismissal of a *pro se* civil rights complaint was proper where the complaint "lacked specific factual allegations showing the defendants' participation in the alleged discriminatory practice"; the court remarked that "we do not supply essential elements of a claim that were not initially pled."

therefore, respectfully request that the language purporting to limit the number of pre-trial immunity appeals be vacated.

B. In this regard we note that the panel's *dictum* on pretrial immunity appeals conflicts with the Ninth Circuit's earlier decision in *Fry v. Melaragno*, 939 F.2d 832, 835 n. 5 (9th Cir. 1991).[3] In *Fry*, the Ninth Circuit addressed the immunity issue at the motion to dismiss stage because, "given that a claim of absolute immunity could be interposed again on a motion for summary judgment, judicial economy favors the resolution of this legal issue now, rather than on a subsequent interlocutory appeal." 937 F.2d at 835 n. 5. The *Fry* court observed that "because *Mitchell* [v. *Forsyth*] contemplates that immunity may be raised before trial on both a motion to dismiss and for summary judgment, 'it is possible that the progress of civil rights actions * * * may be interrupted by not one but two interlocutory appeals' " (citation omitted). The panel's *dictum* in this case, limiting a litigant to one pre-trial immunity appeal, cannot be reconciled with *Fry*.

Nor can the panel's *dictum* be reconciled with decisions of sister circuits, or decisions of the Supreme Court. In *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1984), the Supreme Court expressly held that "[t]he denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets [the

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[3] While an intra-circuit conflict would normally justify reconsideration by the Court *en banc* under Rule 35-1, the discussion is *dictum*, and not appropriate for *en banc* review.

appealability requirements of *Cohen*]." *Mitchell* thus sanctions appeals at both pre-trial stages.

In *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. denied sub nom., Hanton v. Kennedy*, 479 U.S. 1103 (1987), the Sixth Circuit held that *Mitchell* contemplates "two stages at which the doctrine of immunity may be interposed in advance of trial," and observed that immunity litigation "may be interrupted by not one, but two interlocutory appeals," 797 F.2d at 299. The Sixth Circuit reaffirmed this holding in *Sinclair v. Schriber*, 834 F.2d 103, 105 (6th Cir. 1987): "*Mitchell v. Forsyth* has permitted two bites of the appellate apple, at the pleading and discovery stage." But see, *Abel v. Miller*, 904 F.2d 394 (7th Cir. 1990) (limiting immunity appeals).

C. Given that the panel's language is *dictum*, and that it cannot be reconciled with decisions of the Ninth Circuit, other federal courts of appeals, or the Supreme Court, vacation of the parts of the panel decision addressing this issue would be proper. Subsequent problems involving erroneous reliance on this *dictum* (thereby causing litigants to forego immunity appeals sanctioned by the Supreme Court), or problems engendered by a litigant's refusal to follow this purported new rule (because it is not a holding, but merely an advisory opinion) can be avoided by a panel decision to delete the offending language.

We urge the panel to delete this language, which is advisory only, not necessary to the decision in this case, and not binding precedent in the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted. The *Siegert* issue should be reconsidered, and the language governing how many pre-trial immunity appeals a litigant may take should be struck from the panel's opinion.

Respectfully submitted,

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COURT OF APPEALS' ORDER DENYING REHEARING, EOD SEPTEMBER 24, 1993

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, v. FEDERAL HOME LOAN BANK BANK OF SAN FRANCISCO, et al., Defendants, and JOHN W. BEHRENS, Defendant-Appellant.	No. 89-56265 D.C. No. CV-89-0969-RMT ORDER (Filed Sep. 24, 1993)

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING, Senior District Court Judge*

The petition for rehearing was misplaced and received by the panel only recently. The panel has voted to DENY the petition for rehearing.

* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

DEFENDANT'S MEMORANDA IN SUPPORT OF SUMMARY JUDGMENT, EOD MARCH 1, 1994

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ROBERT J. PELLETIER,

Plaintiff,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; JOHN W. BEHRENS; FEDERAL HOME LOAN BANK BOARD; and UNITED STATES OF AMERICA,

Defendants.

AND RELATED CLAIMS

Civil No.
CV 89-0969-RMT(Tx)

MEMORANDUM IN SUPPORT OF DEFENDANT JOHN W. BEHRENS' MOTION FOR SUMMARY JUDGMENT

Date: March 28, 1994
Time: 9:30 a.m.
Place: Courtroom of the Honorable Robert M. Takasugi
Pretrial: April 18, 1994
Trial: May 10, 1994

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INTRODUCTION

Plaintiff's claims arise from a confidential letter sent by defendant Behrens in response to a request by the Board of Directors of Pioneer Savings and Loan that the Federal Home Loan Bank Board (FHLBB) approve the employment of plaintiff as president of the institution. The letter stated that an inquiry was being conducted into the failure of Beverly Hills Savings and Loan (BHSL), and that because of plaintiff's prior employment with BHSL "this office is unable at this time to proceed with the application until that inquiry is complete." Mr. Behrens filed a motion to dismiss and a notice of substitution of the United States on the common law tort claims. This Court dismissed as time-barred plaintiff's constitutional[1] and common law claims premised upon the sending of a letter but denied the remainder of the motion without prejudice, finding that discovery was necessary to resolve the issues.

An appeal was taken by defendant Behrens. The issues on appeal were whether the Court erred by failing to substitute the United States on the common law claims and by denying Mr. Behrens' motion to dismiss based on qualified immunity. The Court of Appeals found that substitution of the United States was proper because Behrens had acted within the scope of his employment but affirmed the denial of the motion to dismiss. The case was remanded and a status conference held at which the

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[1] Defendant Behrens later stipulated to reopen the time-barred constitutional claims, based upon the suggestion of the court in *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 868 n.6 (9th Cir. 1992).

Court ordered that additional dispositive motions be filed by March 1, 1994.[2]

STATEMENT OF FACTS

From March 18, 1985, to May 9, 1986, plaintiff served as president of Pioneer Savings and Loan. *Pelletier*, 968 F.2d at 867. He had formerly been employed by Beverly Hills Savings and Loan (BHSL), where he was a member of the Senior Loan Committee. An investigation by the Federal Savings and Loan Insurance Corporation (FSLIC) into the operations of BHSL revealed problems so severe that BHSL was placed in receivership. A continuing investigation by the FSLIC raised questions about the Senior Loan Committee. *Id.*, First Amended Complaint (hereinafter "Complaint"), ¶¶ 9-13, 19.

On March 29, 1984, Pioneer received its insurance of accounts, subject to the condition that it obtain the approval of the FHLBB for any president it might employ during its first three full years of operation. *Pelletier*, 968 F.2d at 867. In May, 1985, plaintiff entered into an employment agreement with Pioneer, with an effective date of March 18, 1985. Employment Agreement, Exhibit A; Previously Lodged Deposition of Robert Pelletier, Vol. 4, p. 496, Exhibit B. That agreement was expressly conditioned upon the approval of Pioneer's Board of Directors. Exhibit A. On May 9, 1985, Pioneer's Board passed a

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[2] In particular, the Court requested that defendant Behrens update his motion for summary judgment filed on July 2, 1991. The present motion supersedes and replaces that prior motion.

resolution approving the agreement, subject to the condition that the agreement also be approved by the FHLBB and state regulators. Minutes of Board of Directors Meeting, Exhibit C. On May 13, 1985, Pioneer submitted the agreement to the FHLBB for approval. Letter of Mark Glahn, Exhibit A. In April, 1986, defendant Behrens was assigned responsibility for supervising the operations of Pioneer. *Pelletier*, 968 F.2d at 868. On May 8, 1986, he sent a confidential letter to Pioneer's Board of Directors stating that because of the ongoing investigation of BHSL no action could be taken on Pioneer's application for approval of plaintiff. Exhibit D. After receiving the letter, Pioneer requested plaintiff's resignation. When he refused, his employment was terminated by Pioneer. *Id.*

ARGUMENT

I. PLAINTIFF WAS NOT DEPRIVED OF A LIBERTY INTEREST.

Plaintiff contends that he was deprived of a liberty interest without due process. It is clear, however, that plaintiff cannot sustain any such claim based upon defendant Behrens' having sent the confidential letter. In *Paul v. Davis*, 424 U.S. 693, 703 (1976), the Court held that an injury to reputation alone violates no constitutional right. Instead, to establish that a liberty interest has been infringed, plaintiff must show that he suffered a tangible loss of a previously recognized right or status as a result of a charge made by the government that seriously damaged his standing and associations in the community. *Roth v. Veteran's Admin. of Govt. of the U.S.*, 856 F.2d 1401, 1410 (9th Cir. 1988). Thus, no deprivation of a liberty

interest occurs unless the government "creates and disseminates a false and defamatory impression about the employee in connection with his termination." *Codd v. Velger*, 429 U.S. 624, 628 (1977) (per curiam). Under this rule, plaintiff must show that the letter states facts which are untrue, that defendant Behrens publicized those facts, and that the assertions were made in connection with the termination of plaintiff's employment. *Fed. Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 477 (9th Cir. 1991).

Plaintiff's liberty interest claim is completely without basis. First, he cannot dispute the truth of any fact asserted in the letter. The hearing required when an individual "has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name.' " *Codd*, 429 U.S. at 627. The purpose of such a hearing is not to determine whether, if the charges were true, the individual was properly discharged. *Id.* at 628. Indeed, the "adequacy or even the existence of reasons" for terminating an individual's employment "presents no federal constitutional question." *Id.* Only if a plaintiff challenges "the substantial truth of the material in question" is a hearing required. If he does not, a name-clearing hearing serves no useful purpose. *Id.*

Therefore, that plaintiff contests the wisdom of awaiting the outcome of the investigation before processing the application for approval, or challenges the conclusion that it was appropriate for him to step aside and for Pioneer to seek a new president, is simply irrelevant. The hearing contemplated by *Codd*, is not concerned with whether there was an adequate basis for suggesting that plaintiff step down. Instead, the only purpose of such a

hearing would be to allow plaintiff to take issue with the truthfulness of the facts set out in the letter. Unless plaintiff can identify a factual statement in the letter which he disputes and which has significant bearing on his reputation, he is not entitled to a name-clearing hearing. *Id.*

It is undisputed that Pioneer applied to the FHLBB for approval of the employment of plaintiff as managing officer. *Pelletier*, 968 F.2d at 868; Complaint, ¶ 18; Exhibit A. It also undisputed that the FSLIC was conducting an investigation of BHSL, (968 F.2d at 868, Complaint, ¶ 19), and that plaintiff had formerly been employed with that institution. 968 F.2d at 868; Complaint, ¶¶ 9-13. These are the sole facts set out in the letter. Plaintiff cannot challenge the truth of these facts. Consequently, he cannot meet his burden of showing that he was deprived of a liberty interest.

Moreover, even if plaintiff could show that any fact in the letter is untrue, his claim fails because the letter was not publicized by defendant Behrens. To the contrary, the letter bore the heading "CONFIDENTIAL" and was addressed and delivered solely to the Board of Directors of Pioneer.[3] *See* Exhibit D. Mr. Behrens denies having

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[3] Communicating in this manner with Pioneer was, of course, entirely proper because Pioneer made the application for approval. In *Henderson*, 940 F.2d at 477-478, the president of a state-chartered bank was terminated from his employment after state regulators told the bank's Board of Directors that they should ask for his resignation because of unsatisfactory management practices. The court found that because the individual defendant made the charges only to the Bank's Board of Directors and was not responsible for releasing any damaging information to the public, plaintiff had not established the deprivation of any liberty interest. *Id.*

published this letter to anyone else at any time, declaration of John W. Behrens, Exhibit E, and plaintiff has testified that he has no evidence to the contrary.[4] Exhibit B (deposition of Pelletier, Vol. 2, pp. 176-80, Vol. 3, pp. 352-54, 393-398).

The absence of any action taken by Mr. Behrens subsequent to the sending of the letter is also fatal to plaintiff's claims of ongoing interference with his efforts to obtain employment. The Court of Appeals found that plaintiff's general allegations of concerted action by the defendants directed at preventing plaintiff from securing employment and at destroying his reputation supported the inference (for purposes of a motion to dismiss) that "a cause and effect relationship existed between conduct on Behrens' part and the withdrawal of particular job offers." 968 F.2d at 872. However, the court also found

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[4] It is not sufficient for plaintiff to claim that he is himself compelled to reveal the basis for his termination to potential employers. Plaintiff's own conduct cannot give rise to a constitutional claim against defendant Behrens. A liberty interest is implicated only when the governmental defendant "**creates** and **disseminates** a false and defamatory impression" about an individual in connection with his termination from employment. *Codd v. Velger*, 429 U.S. at 628 (emphasis added). *See also Bollow v. Fed. Reserve Bank*, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (when reasons are not published, inferences drawn from the fact of termination are insufficient to implicate liberty interests); *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1495 (9th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Henderson*, 940 F.2d at 477-478 (no deprivation of liberty occurs when statements are not publicly disclosed by the defendant, even though disclosed by others); *Hyland v. Wonder*, 972 F.2d 1129, 1142 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2337 (1993) (no deprivation of liberty occurs where statements are not publicly disclosed).

that "Pelletier's complaint raises at most nebulous theories of conspiracy, and that those theories in their current form would be insufficient to survive a motion for summary judgment." *Id.* The Court of Appeals clearly contemplated that plaintiff would produce evidence of specific acts by defendant Behrens beyond the mere sending of the letter. The record, however, is bare of any such evidence.

In any event, the Supreme Court's decision in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), casts significant doubt upon the occupational liberty theory relied on by plaintiff. In *Siegert*, the Court rejected claims remarkably similar to those raised by plaintiff here. Siegert resigned from his position at a federal hospital to avoid being terminated for cause. He obtained new federal employment, but that employment was conditioned upon obtaining "credentials". In connection with Siegert's request for credentials, his former supervisor sent a letter stating that Siegert was "both inept and unethical, perhaps the least trustworthy individual I have supervised." *Id.* at 1791. As a result, Siegert was denied the credentials necessary to keep his job. He sought a position with another hospital but was turned down. Ultimately, his federal employment was terminated. *Id.*

Siegert alleged that the letter caused him to lose his government employment and that because of it he could not find comparable work. The Court rejected his claims, holding that he had shown nothing more than an injury to reputation which was not entitled to constitutional protection. *Id.* at 1794. The Court recognized that "the statements contained in the letter would undoubtedly damage the reputation of one in his position and impair

his future employment prospects," but held that "so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a *Bivens* action." *Id.* Under this rule, plaintiff's assertions that jobs have been offered but withdrawn because of the letter and that he has been foreclosed from other employment raise no claim of constitutional dimension.[5]

II. PLAINTIFF DID NOT HAVE A PROPERTY INTEREST IN HIS EMPLOYMENT.

Plaintiff contends that he was deprived of a property interest in his employment by the May 8 letter and asserts that he should have been permitted a hearing under 12 U.S.C. § 1730(g) (repealed 1989) prior to being terminated by Pioneer. The apparent basis for plaintiff's claim is an

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[5] In *Botefur v. City of Eagle Point*, 7 F.3d 152, 158 (9th Cir. 1993), the court, relying on *Siegert*, held that a claim that false statements made by a governmental defendant impaired the plaintiff's liberty interest in pursuing future employment in his chosen profession could not survive because "the alleged defamatory statements were made, if at all, after [plaintiff] resigned." Similarly, in *Mahoney v. Kesery*, 976 F.2d 1054, 1060-61 (7th Cir. 1992), the court recognized that *Siegert* can be "read to suggest that no consequence, however grave, resulting from a loss of reputation can make defamation actionable as a constitutional tort. If this is right, the 'occupational liberty' rationale that we have developed to make sense of the dispensation which *Paul v. Davis* allowed for some defamations to remain actionable under section 1983 may be out the window and the withdrawal of that dispensation itself imminent."

"Employment Agreement"[6] dated March 18, 1985.[7] (Exhibit A.) The opening paragraph of the document states that "**[u]pon approval of Employer's Board of Directors**, this agreement is entered into. . . . " The minutes from Pioneer's Board of Directors meeting held on May 9, 1985, establish that the Board voted to approve the agreement but only "**subject to the approval of the Employment Agreement by the California Savings and Loan Commissioner (the 'Commissioner') and the Federal Home Loan Bank Board.**" Exhibit C at 78. In other words, Pioneer's acceptance of the agreement was expressly conditioned upon the receipt of approval of that agreement from federal and state regulators.

Property interests are not created by the Constitution. "Rather, they are created and their dimensions defined by existing rules or understandings that stem from state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). A "unilateral expectation" of continued employment receives no constitutional protection. Instead,

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[6] Section 1730(g), standing alone, cannot form the basis for any claimed property interest because "[t]he categories of substance and procedure are distinct. Were the rule otherwise, the [Due Process] Clause would be reduced to a mere tautology. Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). *See also Dorr v. County of Butte*, 795 F.2d 875, 877 (9th Cir. 1986); *Henderson*, 940 F.2d at 475.

[7] The document was actually signed in May, 1985. Deposition of Pelletier, Vol. 4, p. 496 (Exhibit B).

plaintiff must establish a "legitimate claim of entitlement." *Id.* Clearly, he cannot prove such an entitlement. By the terms of the agreement, plaintiff's employment with Pioneer was contingent upon the approval of the FHLBB.[8] Absent such approval, plaintiff could have no legitimate claim of entitlement to continued employment.[9]

The requirement of prior approval upon which Pioneer conditioned its acceptance of the Employment Agreement was, of course, mandated by Condition 10(p) of the Resolution granting Pioneer's application for Insurance of Accounts. Exhibit G. Condition 10(p) required that Pioneer "provide for employment of a qualified full-time executive managing officer, subject to the

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[8] The Board of Directors' Resolution also required that California Savings and Loan officials approve the employment agreement. Accordingly, plaintiff must come forward with some evidence that the State approved the March 18, 1985, employment agreement. Absent such proof, he cannot establish a legitimate claim of entitlement to continued employment at Pioneer.

[9] Moreover, to give rise to a protected property interest, an understanding must be "mutually explicit." *Roth*, 856 F.2d at 1409; *Hyland*, 972 F.2d at 1140. Clearly, while plaintiff may have cherished a unilateral expectation of continued employment, Pioneer understood plaintiff's employment to be conditioned upon regulatory approval. See Exhibit C. Indeed, in response to an Interrogatory propounded by defendant OTS inquiring as to the basis for the allegation in paragraph 18 of the complaint that "Pioneer was required . . . to obtain the approval of its employment of Pelletier as President by the FHLBSF," plaintiff admitted that he "is not aware of whether any such enforceable requirement exists or existed but is aware that after he was employed and in 1985 and 1986, Pioneer's Board of Directors believed that such a requirement existed." (Exhibit F.)

approval by the Principal Supervisory Agent," and that "the continuation or succession of competent management will also be subject to the Principal Supervisory Agent's approval." *Id.* The authority to impose such a condition flowed from 12 U.S.C. § 1726(c) (repealed 1989), in which Congress directed that an application for insurance of accounts should be rejected if the institution's financial policies or management are unsafe or the character of the management "is inconsistent with economical home financing or the purposes of this subchapter." Federal regulations were adopted to implement this statutory mandate. Under 12 C.F.R. § 571.6(b)(2)(i), applicants for insurance of accounts were required to submit a business plan providing for "the continuation or succession of competent management subject to the approval of the Principal Supervisory Agent."[10]

Any employment contract between plaintiff and Pioneer that did not contain a condition of regulatory approval would have been contrary to federal law and therefore void. In *Conolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-25 (1986), the Court held that "when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional powers by making contracts about them." *See also Bollow*, 650 F.2d at 1099

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[10] Many of the statutes and regulations pertinent to this case were changed as a result of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), P.L. No. 101-73, 103 Stat. 183 (1989). Because the relevant actions in this case took place prior to the enactment of FIRREA, this brief refers to the statutes and regulations in effect at that time.

("A void contract is clearly insufficient to support a claim of entitlement to government employment."); *Hyland*, 972 F.2d at 1141 ("promises of continued employment made in direct contravention of applicable law are insufficient to create a claim of entitlement for purposes of the Due Process Clause.").

Plaintiff cannot establish that he held an entitlement to continued employment. At best, he had only a unilateral expectation that he would continue as president of Pioneer. Moreover, even if Pioneer had entered into an agreement with plaintiff that did not contemplate regulatory approval, that agreement would have been directly contrary to federal law and therefore void. Thus, plaintiff has not stated a claim for deprivation of a property interest.

III. PLAINTIFF HAS NOT STATED A CLAIM FOR DENIAL OF SUBSTANTIVE DUE PROCESS.

Plaintiff's complaint also raises a substantive due process claim. To state such a claim, plaintiff must establish an inability to pursue his occupation of choice resulting from actions on the part of defendant Behrens which were " 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.' " *Henderson*, 940 F.2d at 474 (quoting *Lebbos v. Judges of Super. Ct., Santa Clara County*, 883 F.2d 810, 818 (9th Cir. 1989). Plaintiff cannot meet his burden on this issue because the Court of Appeals has already ruled that defendant Behrens wrote the letter to ensure that "the management of newly chartered federal savings

and loan institutions was entrusted to competent, reliable, and trustworthy individuals." 968 F.2d at 877. Moreover, even if plaintiff could prove subsequent communications by Behrens, "the 'business' of the FHLBB is the supervision of the savings and loan industry to ensure regulatory compliance, and the character and conduct of industry executives are matters within its legitimate concern regardless of whether or not the employment was initially contingent on the FHLBB's approval." *Id.* Accordingly, plaintiff cannot establish a violation of substantive due process rights.

IV. DEFENDANT BEHRENS IS ENTITLED TO QUALIFIED IMMUNITY.

When a government official claims the protection of qualified immunity, the court must decide "whether, in light of clearly established principles governing the conduct in question, the officer objectively could have believed that his conduct was lawful." *ACT Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). To make this determination, the court must decide whether the law governing the official's conduct was clearly established at the time he acted and if, under that law, a reasonable officer could have believed his actions were lawful. *Id.*[11]

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[11] Qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Accordingly, it must be resolved "at the earliest possible stage in litigation" and "ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 112 S. Ct. 534, 536-37 (1991). When the facts underlying a claim of immunity are undisputed, "a district court must determine the issue on

Whether the law was clearly established is a question of law to be resolved by the court. *Act Up!*, 988 F.2d at 873. Whether the uncontroverted facts could support a reasonable belief that the conduct was lawful must also be determined by the court. *Id.*

"A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 111 S. Ct. at 1793. As already set forth, plaintiff has not stated any claim which rises to the level of a constitutional violation. Thus, even if the Court were nevertheless to make such a finding, it would necessarily be based on law that was not **clearly established.** For example, there appears to be no case law supporting plaintiff's argument that the publication of the letter by plaintiff constitutes the deprivation of a liberty interest by defendant Behrens. In addition, the Supreme Court's decision in *Siegert* casts doubt upon the continued viability of plaintiff's entire "occupational liberty" rationale. *See* footnote 5, *supra.* Similarly, there are no cases that clearly establish that an individual whose private employment is conditioned on regulatory approval has a protected property right in that employment. To the contrary, those decisions construing the question have held to the contrary. *See Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1212 (5th Cir. 1989) (no clearly established property interest in employment with proposed bank whose existence is contingent

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motion for summary judgment." *Act Up!*, 988 F.2d at 873. *See also Hemphill v. Kincheloe*, 987 F.2d 589, 593 (9th Cir. 1993).

upon regulatory approval); *Meyer v. Fidelity Sav.*, 944 F.2d 563, 576-77 (9th Cir. 1991), *reversed on other grounds sub nom FDIC v. Meyer*, No. 92-741 (U.S. Feb. 23, 1994) (no clearly established property interest in continued employment with federally insured institution in receivership.); *Gallagher v. Hamilton Standard Fed. Credit Union*, No. 93CV1118 (D. Conn. Nov. 11, 1993) (attached at Appendix) (no deprivation of clearly established property right where officials recommended to credit union that it dismiss its contract employees rather than proceeding with formal removal proceedings); *Mann v. Carver*, 644 F. Supp. 129, 132 (E.D. Mo. 1986) (no due process claim where official proposed a reorganization requiring plaintiff to step down as director rather than initiating formal removal proceedings). Indeed, the Court of Appeals has already signaled the unsettled nature of the law applicable to plaintiff's claims, noting that "[w]e have not yet had occasion to consider whether a requirement of regulatory approval suffices to negate entirely the constitutional protection to which a privately employed individual would otherwise be entitled." *Pelletier*, 968 F.2d at 871.

The decisions cited above dictate a finding that the law on which plaintiff bases his claims was and is not clearly established. As the Court of Appeals recognized in *Meyer*, 944 F.2d at 577, the "[r]ules governing federally insured institutions . . . make for treacherous law." The unsettled nature of the law governing plaintiff's claims and the uncontroverted facts of this case show that a reasonable official, standing in the shoes of defendant Behrens, could have believed his conduct was lawful. Plaintiff simply has not stated a violation of any clearly

established constitutional law. Accordingly, defendant Behrens is entitled to qualified immunity.

V. SPECIAL FACTORS COUNSEL HESITATION IN IMPLYING A BIVENS REMEDY

Even assuming that plaintiff could state a constitutional claim, this Court should decline to imply a remedy directly under the Constitution. There are two comprehensive remedial schemes specifically created by Congress to address claims such as those raised by plaintiff in this case.[12] The existence of these statutory schemes is a special factor which precludes implying a remedy under the Constitution.

"The implication by courts of a tort action for alleged constitutional violations is inappropriate when there are 'special factors counselling hesitation in the absence of affirmative action by Congress.' " *Sky Ad v. McClure*, 951 F.2d 1146, 1148 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 58 (1992) (quoting *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971)). One such factor counselling hesitation is "[w]hen the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988).

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[12] This is the argument which the Court of Appeals stated "may merit consideration by the district court at a later stage in the proceedings." 968 F.2d at 871.

When a statutory scheme "has been constructed with careful attention to conflicting policy considerations," it should not "be augmented by the creation of a new judicial remedy for the constitutional violation." *Bush v. Lucas*, 462 U.S. 367, 388 (1988). Thus, if Congress has created " 'a comprehensive statutory scheme to address a particular class of claims, the courts will not act to create additional judicial remedies, even where a particular litigant does not have a remedy available under the statutory scheme.' " *Pereira v. U.S. Postal Service*, 964 F.2d 873, 875-76 (9th Cir. 1992) (quoting *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 275-76 (10th Cir. 1991). Under this rule, "[s]o long as Congress' failure to provide money damages or other significant relief, has not been inadvertent," a constitutional tort remedy is precluded. *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989).

The first remedial scheme available to plaintiff is the Administrative Procedures Act (APA). Under 5 U.S.C. § 706(2)(B), the courts of appeals may set aside any agency action "contrary to constitutional right." Here, it is apparent that plaintiff's constitutional claims are a thinly-veiled attempt to obtain money damages based upon a challenge to the constitutionality of a federal regulation. Throughout this lawsuit, plaintiff has maintained that 12 C.F.R. § 571.6(b)(2)(i) (the regulatory source for Condition 10(p)), is invalid because, according to plaintiff, there is no statutory authority for imposing a condition subsequent upon the issuance of insurance of accounts. The gist of plaintiff's argument is that § 571.6 is a statement of policy which, when applied as a substantive rule, had the effect of denying him a hearing under 12 U.S.C. § 1730(g). This, plaintiff maintains, is a violation

of his due process rights. *See e.g.* Pelletier's Memorandum in Opposition to Request to Substitute USA for Behrens, filed August 5, 1991, at 6.

In *Sky Ad*, however, the court held that "Congress' authorization in the APA for courts of appeals to set aside unconstitutional rulemaking" is a special factor counselling hesitation in permitting a constitutional tort action to proceed. 951 F.2d at 1148. Here, as in *Sky Ad*, plaintiff is attempting to circumvent the remedial scheme put in place by Congress to address agency action which is alleged to be contrary to law. That the APA does not permit plaintiff to recover damages is immaterial because Congress' failure to provide for such relief was not inadvertent. *Id.*

The second comprehensive remedial scheme barring plaintiff's claims is that governing the savings and loan industry during the events giving rise to this suit.[13] Savings and loan institutions are subject to pervasive regulation and control by the federal government. The purpose of this expansive regulation is to protect the interests of depositors who have placed their funds in federally-insured institutions. Congress has consistently recognized that the character of an institution's management is of critical importance to this goal. Consequently, Congress granted to the FSLIC and the FHLBB broad authority to determine who could own, operate and manage insured institutions. In 12 U.S.C. § 1726(c), Congress

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[13] Again, except where otherwise noted, the statutory scheme referred to in this argument is that in effect at the time of the events leading to this suit rather than that subsequently established by FIRREA.

directed that the FSLIC reject the application of any institution for insurance of accounts if it found that the institution's financial policies were unsafe or that the character of management was "inconsistent with economical home financing or with the purposes of this subchapter." Tellingly, however, Congress provided no mechanism for administrative or judicial review of decisions made under authority of 12 U.S.C. § 1726(c).[14]

In response to the Congressional mandate to reject applicants for insurance of accounts if the institution's financial policies or the character of its management was inconsistent with Congress' goal of protecting depositors, the FSLIC developed regulations governing "de novo" institutions, that is, institutions like Pioneer which had been in operation for less than three full years. *See* 12 C.F.R. § 571.6(b). Under these regulations, an applicant for insurance of accounts was required to implement a business plan for its first three years of operation providing for "the continuation or succession of competent management subject to the approval of the principal Supervisory Agent." § 571.6(b)(2)(i). It is § 1726(c) and the regulations implementing it which formed the basis for the actions taken by defendant Behrens.

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[14] Even after FIRREA there continues to be no remedy available to an officer of a federally-insured institution whose application for approval is rejected. Under 12 U.S.C. § 1831i, an officer of an institution chartered less than two years must seek approval from the appropriate federal banking agency. The statute provides no remedy for an officer whose application is disapproved.

The statutory scheme crafted by Congress to address the savings and loan industry was not limited to the insurance of accounts arena. For example, even beyond the de novo period, an institution could not be acquired by new owners without FSLIC approval. *See* 12 U.S.C. § 1730(q). One seeking such a change of control was subject to an investigation of his competence, experience, integrity and financial ability, §§ 1730(q)(B)(i), (ii), and was required to provide detailed personal background information. § 1730(q)(6). An adverse decision on the application could be contested at an administrative hearing and was subject to judicial review at the appellate level. 12 U.S.C. § 1730(q)(4), (5). Similarly, officers of an institution were subject to continuing scrutiny by the FSLIC. If the FSLIC found evidence of personal dishonesty, the violation of any law, rule, regulation, or final cease-and-desist order, participation in unsafe or unsound banking practice or breach of fiduciary duties, the officer could be immediately suspended and subjected to formal removal proceedings. 12 U.S.C. § 1730(g)(1), (2). A similar process took place when an officer was charged with a crime involving dishonesty or breach of trust. 12 U.S.C. § 1730(h). A notice of intent to remove an officer under §§ 1730(g) and (h) could be challenged at an administrative hearing. A suspension could be stayed by an appropriate district court upon application by the officer. § 1730(g)(6). Judicial review at the appellate level was available for a final removal. 12 U.S.C. § 1730(h)(2).

It is clear from these detailed provisions that Congress was well aware of the impact an adverse decision by regulators might have upon individual thrift officers,

and knew well how to provide for judicial or administrative review when appropriate. Clearly, a decision to reject an application for insurance of accounts due to the character of management affects not only the institution but also the proposed officer. Yet Congress, in its wisdom, provided no remedy for actions taken by an agency under authority of § 1726(c). Indeed, the continuing intention of Congress to deny a remedy under these circumstances is clearly evident from 12 U.S.C. § 1831i, the current statute. Moreover, the elaborate remedies laid out in 12 U.S.C. §§ 1730(g), (h) and (q) demonstrate that Congress was cognizant of the effect an adverse finding on an officer's qualifications might have and provided for redress where it was deemed appropriate. The failure to provide any remedy in the context of insurance of accounts was not inadvertent. Instead, it reflects the exercise of legislative discretion, after a careful balancing of the interests of an affected individual against the need to protect the soundness of the thrift system. To imply a constitutional remedy here, would contradict the Congressional determination that none should be available.

CONCLUSION

For the reasons stated above, defendant Behrens is entitled to summary judgment in his favor.

Respectfully submitted,

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT, EOD MARCH 14, 1994

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. JOHN W. BEHRENS, et al., Defendants.	CASE NO. CV 89-0969-RMT (Tx) PLAINTIFF PELLETIER'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT BEHRENS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT OTS'S MOTION FOR SUMMARY JUDGMENT

ROBERT J. PELLETIER, Counterclaim Plaintiff, vs. FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, Counterclaim Defendant.	Date:	Believed Submitted
	Time:	Believed Submitted
	Ctrm:	22
	Disc. C/O:	February 15, 1994
	Mot. C/O:	March 1, 1994
	Pretrial:	May 23, 1994
	Trial:	June 21, 1994

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I. INTRODUCTION.

Plaintiff Robert J. Pelletier ("Pelletier") submits this Memorandum of Points and Authorities in Opposition to Motions by Defendants John W. Behrens ("Behrens"), and by the Office of Thrift Supervision ("OTS") (as successor in interest to the Federal Home Loan bank Board ("FHLBB") and the Federal Home Loan Bank of San Francisco ("FHLBSF") for Summary Judgment.[1] Pelletier

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[1] To the extent that there exists a separate motion for summary judgment by the United States of America, Pelletier opposes it on the grounds set forth in his opposition to its earlier motion and on the grounds set forth herein.

presents a single Memorandum in opposition to both motions because the two motions raise a number of similar issues, and the OTS, particularly, expressly relies on the Behrens motion rather than separately arguing for a number of the points OTS seeks to make.

This Court should deny both Motions for numerous reasons.

- Both Behrens and the OTS advance arguments in support of points previously decided against them by this Court.

- Both Behrens and the OTS seek summary judgment on the basis of facts that are different from the facts of this case.

- Both Behrens and OTS seek summary judgment on the basis of facts that are disputed, irrelevant, ambiguous, or simply unsupported by admissible evidence by their proponent. See Pelletier's STATEMENT OF GENUINE ISSUES OF MATERIAL FACT IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT, concurrently filed and served, in which Pelletier sets forth in detail the factual disputes as to *each* of the material facts advanced by Behrens or OTS as "uncontroverted"; Pelletier also objects to many of these same facts on the grounds that they are irrelevant, that they are vague and ambiguous in the form proposed, and/or that defendants have cited no admissible evidence in support of the facts.

Pelletier will respond to the arguments of Behrens and OTS roughly in the order these arguments are presented, taking Behrens first and OTS next.

Pelletier disputes the "statement of facts" offered by Behrens and by OTS. These facts, which are also set forth in Behrens' "Proposed Statement of Uncontroverted Facts and Conclusions of Law," and OTS's "Statement of Uncontroverted facts and Conclusions of Law," are addressed in Pelletier's own "Statement of Genuine Issues of Material fact in Opposition to Motions for Summary Judgment," and will not further be argued herein.

II. PELLETIER'S OPPOSITION TO BEHRENS' ARGUMENTS.

A. Behrens Deprived Pelletier of a Liberty Interest.

Behrens argues that the Behrens Directive did not result in Pelletier's deprivation of a liberty interest. The Behrens Directive, Exhibit D to Behrens' Motion, is a May 8, 1986 letter from Behrens to the Board of Directors of Pelletier's employer, directing the Board to fire Pelletier. Pioneer did fire Pelletier. Pelletier has been compelled to disclose the Behrens Directive to all prospective employers in the financial services industry. As a result, Pelletier's thirty-year career as a financial services executive has been destroyed.

Behrens argues that in order to deprive Pelletier of a liberty interest, the Behrens Directive must create a false and defamatory impression about Pelletier in connection with his termination, and must be disseminated by

Behrens. While Pelletier disputes this position, the Behrens Directive clearly satisfies all those requirements. On its face it creates the impression that Pelletier was somehow materially responsible for the failure of Beverly Hills Savings and Loan Association, or at the very least there were such serious indications of his responsibility that the regulatory authorities considered him unfit to serve in the industry. Pelletier could not conceal the Behrens Directive from prospective employers; it was a fact material to any decision to employ Pelletier, and its existence was sure to come out anyway.

Codd v. Velger, 429 U.S. 624 (1977) is otherwise inapposite. That case involves no dispute between the parties over the truth of the allegations made against Codd in connection with his termination, *id.* at 627, and Codd, a probationary employee, had no right in the job from which he was terminated. *Id.* at 625. Further, *Codd* is an action against the government employer who terminated Codd, and involved no allegation that Codd's career had been ruined.

FDIC v. Henderson, 940 F.2d 465 (9th Cir. 1991), is also inapposite. *Henderson* involved the termination of an officer of an insolvent bank according to statutory procedures. The instant case involves Behrens' lawless order of termination of Pelletier from a solvent institution. Other cases cited by Behrens, *see* Behrens Memorandum, 6 n.4, likewise are inapposite. In *Bollow v. Federal Reserve Bank*, 650 F.2d 1093 (9th Cir. 1981), *e.g.*, plaintiff was terminated for using profanity against co-workers. *Id.* at 1096. There were no allegations that the Bank publicized the reasons for plaintiff's termination or that plaintiff was required to disclose those reasons. *Id.* at 1101. There was

no evidence plaintiff could not continue his career as a banking lawyer.

Siegert v. Gilley, 111 S.Ct. 1789, 114 L.Ed.2d 284 (1991) is equally inapposite. Siegert, a psychologist, resigned from his position at St. Elizabeth's Hospital, a federal institution, rather than be terminated for absenteeism and insubordination. He later obtained federal employment at an army base. His supervisor wrote to Gilley at St. Elizabeths about him, and Gilley wrote back pejorative comments. Siegert sued for *Bivens* and other claims. The court held that Gilley's statements might be actionable under state law but did not create a *Bivens* claim because they were not made in connection with Siegert's termination. In Pelletier's case, the Behrens Directive was the direct cause of Pelletier's termination from his position as managing officer of Pioneer, and of Pelletier's exclusion from the profession he had pursued successfully for thirty years.

B. Pelletier Had and Has a Property Interest in His Employment and Profession.

Behrens argues that Pelletier had no property interest in his employment because a March 18, 1985 contract conditions that employment on approval by Pioneer's Board and the regulatory authorities. Behrens apparently now concedes that pursuant to *Greene v. McElroy*, 360 U.S. 474, 492 (1959), *Truax v. Raich*, 239 U.S. 33 (1915), *Merritt v. Mackey*, 827 F.2d 1368, 1370 (9th Cir. 1987), and other

authorities cited in previous filings by Pelletier, Pelletier's right to pursue his profession free from government interference was clearly established at the time of the Behrens Directive.

Pelletier disputes that the contract relied upon by Behrens was the operative contract for Pelletier's employment at Pioneer. *See* "Declaration of Robert J. Pelletier in Opposition to Motions for Summary Judgment and Substitution," dated August 1, 1991, filed and served August 5, 1991 (the "Pelletier Declaration"), ¶¶ 10 – 15, and exhibits referenced therein.[2]

Pelletier further contends that the FHLBB consented to and approved his employment at Pioneer by dealing with him as Pioneer's executive managing officer for over a year without any complaint or protest.

Accordingly, Behrens' argument that Pelletier had only a "unilateral expectation" of continued employment has no merit, for it is contrary to the indisputable facts. Pelletier was employed pursuant to a valid contract between himself and Pioneer, the March 7, 1985, contract (Exhibit E to Pelletier Declaration), and with the fourteen-month knowledge and continued acquiescence of FHLBB and other regulatory authorities with whom Pelletier regularly dealt.[3]

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[2] Pelletier requests that the Court take judicial notice of this declaration and attaches a copy as Exhibit A to his "Statement of Genuine Issues of Material Fact" for the Court's convenience.

[3] Note also that FHLBB resolution No. 84-164 (March 29, 1984), attached as Exhibit G to the Behrens Motion, at pg. 1, ¶ 4, requires the "conditions of approval" to be met within six

Additionally, Behrens can cite no authority and no facts in support of *his* authority to send the Behrens Directive. To the contrary, the Ninth Circuit expressly held that "Behrens was not authorized to remove Pelletier from his position as managing officer [of Pioneer]." *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 878 (9th Cir. 1992). Pelletier had a right *not to be terminated by Behrens*. This Court has likewise held that the Behrens Directive was unauthorized. See Order re Behrens substitution request.

Behrens seeks to rely upon statutes and regulations which do not apply to him, and which in fact provide Pelletier with procedural protection denied to him by Behrens and the Behrens Directive. 12 U.S.C. § 1726(c) and 12 C.F.R. § 571.6(b)(2)(i) do not support Behrens' position. He did not proceed pursuant to them, for he had no authority to do so. 12 C.F.R. §§ 501.10, 501.11 *deny* Behrens the authority to send the Behrens Directive.

Behrens myopically addresses only Pelletier's termination from Pioneer, caused by the Behrens Directive, and ignores the fact that the Behrens Directive further destroyed Pelletier's professional career, in which Pelletier had a well-established property interest in 1986.

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months. This provision further strengthens Pelletier's position that the regulatory authorities had approved his employment by May 1986.

C. The Behrens Directive Denied Pelletier Substantive Due Process.

Behrens argues that Pelletier has no substantive due process claim because he cannot prove that Behrens' actions were " ' "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." ' " Behrens' sole authority for this proposition is a purported statement in the Ninth Circuit's *Pelletier* opinion that Behrens sent the Directive to ensure that the management of federally insured institutions was competent and reliable. 968 F.2d at 877.

That is not what the Ninth Circuit said, however. The Ninth Circuit language quoted by Behrens identifies the one of the general objectives of Behrens' employment for the purpose of ascertaining whether the government had lawfully certified that Behrens was acting within the scope of his employment for purposes of substituting the USA in place of Behrens in Pelletier's common law tort claims. Behrens cannot elevate this to a binding finding of fact as to his purpose in sending the Behrens Directive.

Behrens true purpose is a question of fact which cannot be resolved by the instant motion. His purpose is to be found in the tangible evidence, not an abstract legal analysis. After terminating Pelletier, Behrens boasted to a professional colleague, " 'I finally got rid of Pelletier.' " Declaration of Samuel T. Rees in Opposition to Motions for Summary Judgment and Substitution," August 5,

1991, filed and served August 5, 1991 ("Rees Declaration"), ¶ 12 and Exhibit 5, transcript of Schultz deposition, p. 76:22.[4]. Additional evidence suggests that the Behrens Directive had nothing to do with public health, welfare or similar objectives. *See* Pelletier Declaration. ¶¶ 13-15, 17, 18, 22.

D. Behrens Is Not Entitled to Qualified Immunity.

Behrens tries to resurrect his "qualified immunity" argument by suggesting that one's right to employment in a regulated industry was not clearly established in 1986. This is rubbish. One's property right to employment in a regulated industry was clearly established in *Greene v. McElroy*, 360 U.S. 474 (1959), and *Endler v. Schutzbank*, 68 Cal. 2d 162 (1968) *Greene* involves an executive of a defense contractor whose professional career was ruined when the government arbitrarily revoked his security clearance. *Id.* at 478. The regulation of the savings and loan industry hardly begin to approach the extent of regulation of security clearances and defense contractors. *Endler* directly involves regulated financial institutions. *Id.* at 165-66. In each of these cases, extensive government regulation was no barrier to the plaintiff's property interest.

Both *Meyer v. Fidelity Savings*, 944 F.2d 563 (9th Cir. 1991) rev. on other grounds, sub nom. *FDIC v. Meyer*, ___

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[4] Pelletier requests that the Court take judicial notice of this Declaration and attaches a copy as Exhibit B to his Statement of Genuine Issues of Material Fact for the convenience of the Court.

U.S. ___ (slip op. February 25, 1994, attached to OTS Motion), and *Connelly v. Comptroller of the Currency*, 876 F.2d 1209 (5th Cir. 1989) are inapposite. *Meyer* involves an officer of a failed thrift who was fired by the receiver. *Id.* at 565. Pelletier was an officer of a solvent thrift who was terminated because of a Directive sent by Behrens, a regulatory officer who lacked the power to take any such action against Pelletier. 12 C.F.R. §§ 501,10, 501.11 (attached to OTS Motion). *Connelly* involved the refusal of the regulatory authorities to approve a bank in organization. Pioneer, in distinction, had been approved for two years and in operation with insurance of accounts for over a year at the time of the Behrens Directive. Accordingly, neither *Meyer* nor *Connelly* render Pelletier's property rights in his employment or profession even a smidgeon less than *clearly established* at the time of the Behrens Directive.

E. No Special Factors Counsel Hesitation in Implying a Bivens Remedy in Favor of Pelletier.

Behrens attempts to resurrect his "special factors" argument in his instant motion. The Court has rejected this argument. Behrens' argument runs as follows: although Behrens did not act against Pelletier pursuant to *any* statutory scheme, the fact that there was a statutory scheme which might have been applicable requires that Behrens not be held accountable for ignoring that scheme. This argument defies logic and would encourage others in Behrens' position to believe they could act outside the law with immunity whenever they could not

accomplish their desired goals within the law. In other words, Behrens' argument is an argument for anarchy.

Behrens cannot invoke the procedures of the Administrative Procedure Act, e.g., 12 U.S.C. § 706.(2)(B), in his favor, because Pelletier was never afforded any rights under the APA, and Behrens never proceeded pursuant to it. Behrens' discussion of 12 C.F.R. § 571.6 and the APA appeals of "rulemaking" simply misses the point. Behrens cannot take any advantage from 12 C.F.R. § 571.6 because he did not proceed against Pelletier pursuant to that section either. In fact, Behrens had no right under any statute to take action against Pelletier. "Behrens was not authorized to remove Pelletier." *Pelletier v. Federal Home Loan Bank, supra* 968 F.2d at 876.

Behrens cannot hide behind 12 U.S.C. § 1726(c) because that statute provides for the rejection of applications for insurance of accounts, not for the arbitrary termination of officers of insured institutions. Behrens cannot hide behind 12 U.S.C. § 1730(g) because neither he nor anyone else have ever contended that they acted against Pelletier pursuant to that section or afforded Pelletier his rights under that section. The remainder of the statutes cited by Behrens are equally irrelevant for the same reason.

III. PELLETIER'S OPPOSITION TO OTS'S ARGUMENTS.

A. OTS Is Not Entitled to Sovereign Immunity as the Successor to FHLBB.

OTS contends that having been substituted in place of the FHLBSF, it retains its sovereign immunity with respect to Pelletier's claims against the FHLBSF.

The Court decided this point against OTS. *See* this Court's order in this case, entitled "Order Clarifying Substitution Order," October 31, 1991, filed November 6, 1991.[5]

B. Behrens Was Acting as the Agent, *inter alia*, of the FHLBSF in Sending the Behrens Directive.

OTS contends that Behrens was acting exclusively as the agent of the FHLBB in sending the Behrens Directive. This Court decided this point against OTS. *See* "Findings of Fact and Conclusions of Law," January 30, 1992, at 2:2-3 ("On or about May 8, 1986, defendant John W. Behrens ("Behrens"), a supervisory agent of FHLB-SF wrote a letter. . . .).

Should the Court for some reason reverse itself on this point, Behrens' capacity in sending the Behrens Directive still cannot be decided in OTS's favor by motion for summary judgment. Since Behrens had no authority as a "Supervisory Agent" of the FHLBB to write and send

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[5] Pelletier requests that the Court take judicial notice of this and other of its orders in the case attached hereto as Exhibit A for the convenience of the Court.

the letter in the first place, 12 C.F.R. §§ 501.10, 501.11, Pelletier is entitled to a jury finding on whether the letter was sent by Behrens in his capacity as an employee of FHLBSF or some other capacity.

Behrens' argument has an undisclosed premise: that anything Behrens did regarding Pelletier must have been undertaken, as a matter of law, solely in Behrens' capacity as a supervisory agent of the FHLBB, even if that action far exceeded the outer limits of Behrens' authority as a Supervisory Agent.

In support of that unstated premise, OTS implies that the Ninth Circuit in its *Pelletier* opinion concluded Behrens was not acting as the agent of FHLBSF in sending the Behrens Directive. OTS memorandum at 8:3-6. OTS cannot find any support for that conclusion in the *Pelletier* opinion, 968 F.2d 865. The Ninth Circuit concluded only that for purposes of review of the government's certification of substitution of the USA for Behrens with respect to Pelletier's common law tort claims against Behrens, Behrens had acted within the outer perimeter of the scope of his employment.

OTS wrongfully argues that Pelletier was acting exclusively as the agent of FHLBB, relying on 12 C.F.R. §§ 501.10, 501.11. OTS Memorandum at 9:11-14. This regulation provides no authority for Behrens to do what he did, so it cannot shield FHLBSF from liability for Behrens' misconduct. The FHLBSF, through OTS as its successor, must face up to its responsibility for the errant acts of its employee.

C. There were Acts Subsequent to the Behrens Directive.

OTS contends in three different sections of its memorandum (III-A, 11:8-13:2; IV-A, 14:9-15; and V-C, 19:1-5) that there were no acts after May 8, 1986, that affected Pelletier's employment. Pelletier has addressed this point in his Statement of Genuine Issues of Material Fact, at Section A, item 10, and Section B, items 14-16, offering thereat evidentiary support for his position.

OTS as successor to FHLBSF, and Behrens individually, are responsible for Pelletier's compelled republication of the Behrens Directive. *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 796, 168 Cal. Rptr. 89 (1980); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544, 546 (E.D.N.Y. 1986). Pelletier has testified to his compelled republication. Pelletier Declaration, ¶ 24. He has also testified from personal knowledge to the custom and practice of consultation by financial institutions with Behrens and other Supervisory Agents regarding executive appointments. *Id.* at ¶ 31.

The best Behrens can say is that the evidence on this point is in conflict. Accordingly, the Court cannot render summary judgment based on this point.

D. FHLBSF Is an Agent of the Federal Government and Therefore Can Be Liable for Violating Pelletier's Constitutional Rights.

Bivens claims may be pursued against agents of the Federal government. *FDIC v. Meyer, supra,* slip op. at 13. FHLBSF was an agent of the government. *See* analysis in *Fidelity Financial Corporation v. Federal Home Loan Bank of San Francisco,* 792 F.2d 1432, 1435-36 (9th Cir. 1986).

E. FHLBSF, and Behrens, violated Pelletier's Constitutional Rights.

Pelletier's opposition to the OTS's argument that there was no violation of Pelletier's Constitutional rights has been stated above at Section II-A through II-D, and need not be repeated here.

F. There Are False Statements in the Behrens Directive, and the Directive Raises False Impressions About Pelletier.

OTS contends that the Behrens Directive was all true. OTS Memorandum, 14:22. Pelletier has addressed the false and misleading statements in the Behrens Directive in Pelletier's Statement of Genuine Issues of Material Fact, supporting his contentions with evidentiary references and textual analysis. Pelletier Statement, Section A, Item 9. The Behrens Directive on its face creates the impression that Pelletier was in some way materially involved in the collapse of Beverly Hills Savings. If that were not the case, Pelletier's prospective employers

would not have reacted negatively to his disclosure of the Directive. Pelletier Declaration ¶ 24.

G. The Behrens Directive Was Published.

Pelletier has presented evidence that the Behrens Directive was published to several dozen persons. Pelletier Statement, Section B, Item 11. The Directive on its face was circulated widely throughout the Eleventh District FHLBB offices and FHLBSF, as well as to the California regulators. Pelletier was compelled to disclose the Directive to any prospective employer. FHLBSF and Behrens are liable for the Pelletier's injuries from that compelled republication. *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 796, 168 Cal. Rptr. 89 (1980); *Elmore v. Shall Oil Co.*, 733 F. Supp. 544, 546 (E.D.N.Y. 1986).

H. California Recognizes a Claim for Negligent Infliction of Emotional Distress.

OTS argues that there is no *independent* claim for negligent infliction of emotional distress, and that Pelletier's claim for that tort should be subsumed under his negligence claim. OTS memorandum, 15:19-16:3.

Christiansen v. Superior Court, 54 Cal. 3d 868 (1991) addresses this issue in the context of bystander liability. California does recognize the tort of negligent infliction of emotional distress, and even has a Bar Approved Jury Instruction for it. B.A.J.I. 12.80.

I. Pelletier's Fifth and Eighth Claims Are Not Time-Barred.

OTS argues that Pelletier cannot rely on equitable tolling for the period when his claims against FHLBSF and FHLBB were pending as third-party claims in *FSLIC v. Fitzpatrick* (case no. CV 88-00651 RMT(Tx)), because he had not denominated one of his claims as sounding in negligence. Under the Federal Rules, the Court looks to the substance and not the form of the pleadings, which require only a "short and plain statement of the grounds for relief." F.R.Civ.P. 1, 8. Amendments are liberally allowed to conform pleading to proof. F.R.Civ.P. 15(b). This Court can readily find a negligence claim against Behrens and FHLBSF within Pelletier's third party complaint in *FSLIC v. Fitzpatrick*. Pelletier's initial third-party complaint was filed within two-years of the Behrens Directive.

Pelletier has previously addressed the ongoing nature of defendants' conduct and its effect on any statute of limitations problems, as OTS acknowledges. OTS Memorandum, 17 n.20.

J. Pelletier Had a Binding Contract.

OTS asserts that Pelletier had no binding contract with Pioneer and therefore can bring no claim for interference with contract. OTS relies solely on the Behrens Motion. OTS Memorandum, 18:9-10. Pelletier has addressed these arguments at Section II-B, *supra*.

K. Pelletier Has stated a valid APA Claim.

OTS argues that the only source for an APA claim by Pelletier would be if the Behrens Directive constituted a "removal and prohibition" proceeding pursuant to 12 U.S.C. § 1730(g). OTS then argues that the Behrens Directive was not a "removal and prohibition," and that if it had been, Pelletier had to appeal it to an appropriate Federal Circuit Court within thirty days of the issuance of the Directive, relying on 12 U.S.C. § 1730(j)(2). However, § 1730(j)(2) only applies to judicial review of a "cease and desist" order or an order issued after a hearing held pursuant to § 1730(j)(1). The Behrens Directive was not a "cease and desist" order, nor did it issue from a § 1730(j)(1) hearing. Accordingly, OTS's arguments have no merit.

IV. CONCLUSION.

Pelletier has shown above and in his Statement of Genuine Issues of Material Fact that the arguments of OTS and Behrens had no merit. The pertinent facts are all controverted. The law relied upon by defendants does not support their positions.

Pelletier accordingly requests, respectfully, that the Court deny in all respects the motions for summary judgment made by OTS and Behrens.

DATED: March 14, 1994

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By /s/ Samuel T. Rees
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[Exhibits Omitted In Printing]

DEFENDANT'S REPLY TO OPPOSITION TO SUMMARY JUDGMENT, EOD MARCH 21, 1994

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ROBERT J. PELLETIER, Plaintiff, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO; JOHN W. BEHRENS; FEDERAL HOME LOAN BANK BOARD; and UNITED STATES OF AMERICA, Defendants. AND RELATED CLAIMS	Civil No. CV 89-0969-RMT(Tx) REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT BEHRENS' MOTION FOR SUMMARY JUDGMENT Date: Under Submission Time: N/A Crtrm: 22 Pretrial: May 23, 1994 Trial: June 21, 1994 (Filed Mar. 21, 1994)

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INTRODUCTION

Defendant Behrens filed a properly-supported motion for summary judgment accompanied by a statement setting forth the incontrovertible facts of this case. Plaintiff has failed to meet his burden of establishing, through the submission of affidavits or other admissible evidence, specific facts which show there is a genuine issue for trial. As set forth below, as well as in defendant Behrens' motion and supporting memoranda, there are no genuine issues of material fact in this case, and defendant Behrens is entitled to summary judgment as a matter of law.

ARGUMENT

I. Plaintiff has not demonstrated a genuine issue of material fact.

When confronted with a properly supported motion for summary judgment, the party opposing the motion must "set forth specific facts showing that there is a genuine issue for trial". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, (1986). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of

material fact." *Id.* at 247-248. (Emphasis in original.) If the record, taken as a whole, would not lead a rational trier of fact to find in favor of the non-moving party, there is no genuine issue for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A dispute is genuine only if "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted). For this reason, the existence of a mere scintilla of evidence or some "metaphysical doubt" as to the material facts, *Matsushita*, 475 U.S. at 586, is not sufficient to avoid summary judgment. Similarly, summary judgment may not be denied simply because a "jury might, and legally could, disbelieve the defendant's" evidence. *Anderson*, 477 U.S. at 256.

In determining whether a material fact is genuinely in issue, "the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. Accordingly, unless a jury could reasonably find that plaintiff "proved his case by the quality and quantity of evidence required by the governing law", summary judgment must be entered in favor of the defendant. *Id.* at 254.

When confronted with a properly supported motion for summary judgment, a plaintiff may not rest upon the

allegations of his pleadings, but must instead come forward with affidavits or other evidence stating specific facts which show there is a genuine issue for trial. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If he does not, "the plain language of Rule 56(c) mandates the entry of summary judgment." *Celotex*, 477 U.S. at 322. There is, however, "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials negating the opponent's claim." *Id.* at 323. Instead, "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in rule 56(c), is satisfied." *Id.* The moving party meets this standard simply by " 'showing' – that is pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Plaintiff has failed to come forward with any evidence that would demonstrate the existence of a genuine issue of material fact. To the contrary, the disputes he asserts consist of issues of law, facts that are immaterial to the claims against defendant Behrens, and contentions for which he has provided no evidentiary support.[1]

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[1] Instead of producing affidavits or other evidence to demonstrate the existence of a material factual dispute, plaintiff attempts to challenge the bases for the facts defendant Behrens has demonstrated are uncontroverted. For example, plaintiff argues that certain legal and factual findings made by the Court of Appeals should be ignored by this Court. He further argues that "the Ninth Circuit was ruling on pleadings motions and not

A. The Uncontroverted Facts

1. On March 29, 1984, Pioneer received its insurance of accounts, subject to the condition that it obtain the approval of the FHLBB for any president it might employ during its first three full years of operation. Plaintiff agrees that Pioneer received its insurance of accounts on March 29, 1984. *See* Statement of Genuine Issues of Material Fact at 2. He contends, however, that there is a dispute over whether Condition 10(p), requiring that Pioneer obtain FHLBB approval of any president it might employ during the de novo period, could lawfully be imposed. The nature of this dispute is legal rather than factual. The record is clear that the FHLBB imposed a number of requirements upon Pioneer, including Condition 10(p), in exchange for the issuance of insurance of accounts. *See* Exhibit G to defendant

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determining factual issues." Statement of Genuine Issues at p. 14. There is no support for this argument. To the contrary, the Court of Appeals had before it both the question of whether plaintiff's complaint could survive a motion to dismiss and whether the facts of this case supported the conclusion that defendant Behrens had acted within the scope of his federal employment. Indeed, the court found that "there do not appear to be any factual disputes regarding the scope of Behrens' employment," *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 874 (1992), although it disagreed with this Court about the import of those facts. Moreover, the remainder of the appeal dealt with the denial of a motion to dismiss. In evaluating plaintiff's claims, therefore, the court was required to and in fact did draw all reasonable inferences in favor of plaintiff. *Id.* at 872. Plaintiff cannot now be heard to contest those findings.

Behrens' memorandum in support of his motion for summary judgment. Plaintiff attempts to avoid summary judgment by describing the legal issue of whether the FSLIC and the FHLBB could impose or enforce such a condition as a question of fact. The Court should not countenance this tactic.

2. On March 18, 1985, plaintiff began serving as president of Pioneer Savings and Loan.[2] Incredibly, plaintiff asserts that he will testify that he did not begin his employment with Pioneer on March 18, 1985. He does not however, provide any evidence as to when his employment did commence. The declaration to which he refers does not advance his cause because it does not identify a starting date. In any event, it is difficult to imagine what testimony plaintiff could offer on this point, because he has previously testified that he began his employment with Pioneer on March 18, 1985. Deposition of Robert J. Pelletier dated December 3, 1986, Vol. I, pp. 131-134, attached as Exhibit H to this reply.[3] He made an identical admission in letter to the FHLBB (Exhibit I.)

3. Plaintiff had formerly been employed by Beverly Hills Savings and Loan (BHSL), where he was a

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[2] Plaintiff asserts that there is a dispute between OTS and Behrens as to whether plaintiff was the acting managing officer. Defendant Behrens does not dispute that plaintiff was the acting managing officer.

[3] Defendant Behrens does not know the location of the original of this deposition which was taken during litigation to which he was not party. However, he has received a certified copy, which he will lodge should the Court or any party request him to do so.

member of the Senior Loan Committee. Plaintiff does not dispute these facts. Statement of Genuine Issues at 16.

4. An investigation by the Federal Savings and Loan Insurance Corporation (FSLIC) into the operations of BHSL revealed problems so severe that BHSL was placed in receivership. The continuing investigation by the FSLIC raised questions about the Senior Loan committee. Plaintiff contends that these facts, taken directly from the decision of the Court of Appeals, *see* 968 F.2d at 867, are disputed, primarily because he professes confusion over what they mean. He argues that summary judgment should be denied because defendant Behrens must provide testimony to show both that BHSL was placed in receivership as a result of an investigation and that such an investigation revealed problems with the Senior Loan Committee. Even assuming such a dispute to be genuine (although it clearly is not), it is nevertheless immaterial to the resolution of plaintiff's claims against defendant Behrens. Whether or not BHSL was investigated is relevant only the issue of whether the May 8th letter contained any facts which plaintiff is entitled to dispute at a name-clearing hearing. The letter states only that "an inquiry is currently being conducted . . . into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete." Exhibit D to defendant Behrens' memorandum in support of motion for summary judgment. (Emphasis added.) It is undisputed that after BHSL failed, there was an ongoing investigation of the reasons for its failure. Plaintiff's declaration specifically states that "I was aware throughout

my tenure with Pioneer that the federal regulators were examining the reasons for the failure of BHSL. I fully cooperated in that investigation." Pelletier declaration, ¶ 18. The question of whether the actions of the Senior Loan Committee were being investigated, even if disputed, is also immaterial. The May 8 letter makes no reference to the Senior Loan committee.[4] *See* Exhibit D to Behrens' memorandum in support of motion for summary judgment.

5. In May, 1985, plaintiff entered into an employment agreement with Pioneer, with an effective date of March 18, 1985. Plaintiff now contends that the operative employment agreement was that dated March 7, 1985. He provides no support for this assertion, however. To the contrary, his declaration states that in May, 1985, the March 7th contract was revised by a new agreement, namely, the March 18, 1985, agreement. Pelletier declaration, ¶ 12. Moreover, in a deposition taken during his wrongful termination suit against Pioneer, plaintiff testified, in no uncertain terms, that the March 18th contract was the contract in effect at the time of his termination and that its terms governed his employment. (Exhibit H, vol. I, pp. 131-134). His settlement agreement with Pioneer states the same thing. (Exhibit J.)

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[4] Plaintiff also argues, in response to the statement of uncontroverted facts of defendant OTS, that there is a factual dispute over whether and when any investigation of plaintiff was conducted. Even assuming the existence of such a dispute, it is immaterial to any claim asserted against defendant Behrens. The letter does not state that plaintiff was being investigated. It states only that the failure of BHSL was the subject of investigation.

6. The March 18, 1985, employment agreement was expressly conditioned upon the approval of Pioneer's Board of Directors. Plaintiff relies on his declaration to argue that this fact is disputed. The declaration, however, does not even mention the question of approval by Pioneer's Board of Directors. In any event, the agreement itself explicitly sets forth that requirement. Exhibit A to Defendant Behrens' memorandum in support of motion for summary judgment.

7. On May 9, 1985, Pioneer's Board of Directors passed a resolution approving the March 18, 1985, employment agreement, subject to the condition that the agreement also be approved by the Federal Home Loan Bank Board (FHLBB) and the California Savings and Loan Commissioner. Plaintiff asserts that this fact is disputed but offers no evidence to controvert the minutes of the Board of Directors meeting which establish that such a resolution was made by Pioneer. The apparent basis for plaintiff's argument is his assertion that the March 18th agreement was not the agreement that governed his employment. Plaintiff's own testimony establishes to the contrary. Plaintiff also relies on the State of California's approval of his employment with Pioneer in March, 1985, purportedly to show that state regulators approved the March 18th agreement. However, plaintiff has admitted that agreement was not signed until May, 1985. That California approved his employment in March simply does not establish that it approved the agreement dated March 18, 1985. The record is clear that the March 18th agreement was actually reached in May, 1985, two months after California approved Pelletier as president.

8. On May 13, 1985, Pioneer submitted the March 18, 1985, employment agreement to the FHLBB for approval. Plaintiff does not dispute this fact. Statement of Genuine issues at 19.

9. In April, 1986, defendant Behrens was assigned responsibility for supervising the operations of Pioneer. Plaintiff "does not dispute that in April, 1986, Behrens began exercising some degree of supervision over the operations of Pioneer." Statement of Genuine Issues at 19.

10. On May 8, 1986, defendant Behrens sent a confidential letter to Pioneer's Board of Directors stating that because of the ongoing investigation of BHSL no action could be taken on Pioneer's application for approval of plaintiff as its president. Plaintiff asserts that this statement of fact is not an accurate representation of the letter. The letter speaks for itself: "We wish to advise you that an inquiry is currently being conducted by the federal Savings and Loan Insurance Corporation (FSLIC) into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete." Exhibit D to defendant Behrens memorandum in support of motion for summary judgment.

Plaintiff also asserts that it is untrue the FHLBB was unable to proceed with his application. Even assuming that plaintiff had come forward with facts that would establish a genuine dispute on this issue, it is not material to any claim against defendant Behrens. As set forth in defendant Behrens memorandum in support of his

motion for summary judgment and *infra* at p.13 in this reply, the question of whether the FHLBB should have granted the application for approval is irrelevant. The name-clearing hearing provided under *Codd v. Velger*, 429 U.S. 624 (1977) (per curiam), is not concerned with the adequacy or even the existence of reasons for sending the letter. *Id.* at 627.

11. The May 8, 1986, letter has never been made public by defendant Behrens. Plaintiff argues that this fact is disputed because plaintiff himself has brought the letter to the attention of potential employers and because plaintiff believes "it is customary for a savings and loan association to check with its Supervisory Agent orally as to the qualifications of a prospective senior employee." Pelletier declaration at ¶ 31. Defendant Behrens, however, has explicitly denied any such contacts. Plaintiff's declaration is not to the contrary. Indeed, plaintiff admits that he has "no evidence to suggest that this practice was followed by any of my prospective employers." *Id.* Clearly, plaintiff has not demonstrated a genuine dispute of fact. To the contrary, his argument amounts to a claim that "a jury might, and legally could, disbelieve" defendant Behrens. *Anderson*, 477 U.S. at 256. The Supreme Court has categorically rejected the notion that this sort of challenge can defeat a summary judgment motion. *Id.*

Plaintiff also argues that because the letter, on its face, suggests that it was sent to the Board of Directors of Pioneer, the California Savings and Loan Commissioner, the Eleventh District of the FHLBB, and two other individuals, there is a question of fact regarding whether the

letter was made public by defendant Behrens.[5] In addition, plaintiff asserts that the letter was discussed with FHLBB Supervisory Agent Scott Schultz. Whether providing the letter to fellow regulators or Pioneer's Board of Directors constitutes publication for purposes of a due process claim is a question of law, not fact. As set forth in defendant Behrens' memorandum in support of his motion for summary judgment and infra at p. 14 in this reply, as a matter of law, there has been no publication of the letter by defendant Behrens that could support a claim for deprivation of due process.

12. After receiving the letter, Pioneer requested plaintiff's resignation. When he refused, his employment was terminated by Pioneer. Plaintiff does not dispute these facts. Statement of Genuine Issues at 21.

13. Defendant Behrens wrote the May 8, 1986, letter for the purpose of ensuring that "the management of newly chartered federal savings and loan institutions was entrusted to competent, reliable, and trustworthy individuals." *Pelletier*, 968 F.2d at 877. Plaintiff disputes that the Court of Appeals ever made such a finding, and asserts that the testimony of Scott Schultz establishes that defendant Behrens did not write the letter for this purpose. The testimony of Mr. Schultz was before the Court of Appeals when it reached its decision on scope of employment. The Court nevertheless held that:

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[5] Those two individuals were, as plaintiff well knows, fellow employees of defendant Behrens. *See* previously lodged deposition of John Willy Behrens, Volume II, p. 225. A copy of the relevant portion of that deposition is attached as Exhibit K to this reply.

> [W]e think it is clear, that, as a matter of law, Behrens was acting within the scope of his employment when he wrote the letter requesting Pelletier's resignation. Although Behrens was not authorized to remove Pelletier from his position as managing officer, his decision to ask Pioneer to do so did not constitute a deviation from his duties for a personal purpose. Rather, Behrens wrote the letter to further his employer's "business" – namely, that of ensuring that the management of newly chartered federal savings and loan institutions was entrusted to competent, reliable and trustworthy individuals. Taking the allegations in Pelletier's complaint to be true, see supra Part II(C), it is equally clear that, notwithstanding the absence of any similar requirement for regulatory approval with respect to most executive level positions in the savings and loan industry, any subsequent communications that Behrens may have had with potential employers regarding Pelletier's qualifications were also within the scope of Behrens' employment. The "business" of the FHLBB is the supervision of the savings and loan industry to ensure regulatory compliance, and the character and conduct of industry executives are matters within its legitimate concerns regardless of whether or not the employment was initially contingent on the FHLBB's approval.

968 F.2d at 876-877. (Emphasis added). The Court of Appeals has clearly made a determination as to defendant Behrens' purpose in sending the letter. Plaintiff is bound by that determination.

14. Defendant Behrens has not discussed plaintiff, the May 8, 1986, letter, or its contents publicly. As set

out in the discussion regarding defendant Behrens' Statement of Uncontroverted Facts, ¶ 11, plaintiff has not come forward with any evidence sufficient to avoid summary judgment based on this fact.

15. Defendant Behrens has had no contact with any potential employer of plaintiff. As set out in the discussion regarding defendant Behrens' Statement of Uncontroverted Facts, ¶ 11, plaintiff has not come forward with any evidence sufficient to avoid summary judgment based on this fact.

16. Defendant Behrens has not taken any action to prevent Mr. Pelletier from securing employment in the financial institutions industry. As set out in the discussion regarding defendant Behrens' Statement of Uncontroverted Facts, ¶ 11, plaintiff has not come forward with any evidence sufficient to avoid summary judgment based on this fact.

B. Summary Judgement Should Be Granted As a Matter or Law.

1. Plaintiff Was Not Deprived of a Liberty Interest

Plaintiff claims he was deprived of a liberty interest without due process because the May 8, 1986, letter stigmatized him. The process due an individual who has been stigmatized in the course of a decision to terminate his employment is a name-clearing hearing. *Codd*, 429 U.S. at 627. However, no such hearing is required unless the defendant "creates and disseminates a false and defamatory impression about the employee in connection

with his termination." *Id.* at 628. *See also Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 477 (9th Cir. 1991).[6] Unless a plaintiff challenges "the substantial truth of the material in question," he is not entitled to a hearing. *Codd*, 429 U.S. at 627.

Plaintiff has failed to produce any evidence to support a conclusion that any facts in the letter are false. To the contrary, each of the facts set out in the letter is uncontroverted.[7] Although plaintiff argues that the letter implies that he was responsible for the failure of BHSL, where false and stigmatizing reasons are not given for the termination of an employee, inferences drawn from the fact of termination alone will not suffice to state a constitutional claim. *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied*, 455

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[6] Plaintiff asserts that *Henderson* concerned the termination of an officer of an insolvent bank according to statutory procedures. Plaintiff is mistaken. In *Henderson*, as here, the plaintiff claimed that he was entitled to but did not receive certain statutory procedures. Instead, state regulators met with his employer and issued an ultimatum that they would shut down the bank if it did not terminate the plaintiff's employment. *See* 940 F.2d at 470. The court found that there was no deprivation of a liberty interest because the defendants were not responsible for publicizing any damaging information about the plaintiff.

[7] Plaintiff argues that *Codd* did not involve a dispute between the parties over the truth of the allegations made against the plaintiff there, Velger. He is correct, although this provides him no advantage. The absence of any true dispute over the truth of the allegedly stigmatizing statements about Velger was the reason the Supreme Court found Velger had no claim of constitutional dimension. The same result must obtain here because plaintiff has not met his burden of showing that the letter states any facts that are untrue.

U.S. 948 (1982). The dispute claimed by plaintiff over whether there were sufficient reasons for failing to proceed with his application for approval is immaterial because it is not the proper subject of a name-clearing hearing. *Codd*, 429 U.S. at 627.

Moreover, plaintiff failed to provide any evidence from which a rational fact-finder could conclude that defendant Behrens made the letter or its contents public.[8] Although plaintiff argues that he was compelled to publish the letter himself, there is no authority for the proposition that plaintiff's own conduct can give rise to a constitutional claim against defendant Behrens.[9] In any event, it is clear that even plaintiff did not publish the letter until after he was terminated from Pioneer. Under *Siegert v. Gilley*, 111 S. Ct. 1789, 1794 (1991), any injury resulting from such after-the-fact publication is not of constitutional dimension. *See also Botefur v. City of Eagle Point*, 7 F.3d 152, 158 (9th Cir. 1993) (a claim that false statements made by a governmental defendant impaired

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[8] Providing a copy of the letter to defendant Behrens' employer, fellow employees, Pioneer Savings and Loan and the California Department of Savings and Loan clearly did not make the letter public. The proposition that agencies responsible for regulating insured savings and loans should be aware of regulatory actions taken against those institutions is self-evident.

[9] The cases cited by plaintiff regarding compulsory republication are inapposite because they do not concern any constitutional question. Both *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 796, 168 Cal. Rptr. 89 (1980), and *Elmore v. Shell Oil Co.*, 733 F. Supp. 544 (1988), involved common law claims for defamation.

the plaintiff's liberty interest in pursuing future employment in his chosen profession could not survive because "the alleged defamatory statements were made, if at all, after [plaintiff] resigned.") and; *Mertik v. Blalock*, 983 F.2d 1353, 1363 (6th Cir. 1993) (*Siegert* requires that the injury occur at the same time as the claimed stigmatizing publication.)

2. Plaintiff Was Not Deprived of a Property Interest

Plaintiff argues that the March 7th employment agreement provided him with a property interest in his employment as president of Pioneer. However, this agreement was revised and replaced by the March 18th agreement. Plaintiff's declaration attests to that fact, Pelletier declaration, ¶ 12, and his deposition testimony confirms it. The March 18th agreement specifically requires the approval of Pioneer's Board of Directors. The Board did approve the agreement; however, that approval was expressly conditioned upon the requirement that both the FHLBB and the California regulators approve it as well.[10]

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[10] Mysteriously, plaintiff contends that the argument that plaintiff's March 18th employment agreement did not give rise to a protected property interest somehow concedes that plaintiff has such an interest "pursuant to *Green v. McElroy* (sic.), 360 U.S. 474, 493 (1959), *Truax v. Raich*, 239 U.S. 33 (1915), *Merritt v. Mackey*, 827 F.2d 1368, 1370 (9th Cir. 1987), and other authorities cited in previous filings by.Pelletier." Opposition at 4. Defendant Behrens denies that any of the "other authorities" cited by plaintiff in his numerous previous filings support this contention. If they did, plaintiff would surely have identified them in his opposition to defendant Behrens' summary judgment

Plaintiff makes the circular argument that the FHLBB approved his employment by virtue of failing to disapprove it. His complaint, however, alleges that "the FHLBSF delayed giving Pelletier its approval or disapproval for a material period of time." First Amended Complaint, ¶ 18. In any event, longevity alone does not create a property interest. *Bollow*, 650 F.2d at 1099. Moreover, plaintiff was well aware that his contract had not been approved. See letter of August 6, 1985, from plaintiff to Pioneer stating "[t]he Supervisory Agent acknowledged that although the State Commissioner had already approved me as Managing Officer, the additional approval of F.H.L.B. would be required and the request for such was currently under review." (Exhibit L). Indeed, plaintiff testified that in late 1985 he realized the possibility that the application for approval might be turned down. Previously Lodged Deposition of Robert J. Pelletier, Vol. III, pp. 462-463 ("I think I realized that possibility, or that impression came to me probably around the

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motion. To the contrary, under *Board of Regents v. Roth*, 408 U.S. 564 (1972), he clearly had no legitimate claim of entitlement to continued employment with Pioneer. It is quite clear that neither *Greene*, *Truax*, nor *Merritt* stand for the proposition that a person who does not have an enforceable contract nevertheless possesses a protected property interest in employment. *Truax* was an equal protection case in which the Court held that a state law requiring employers to discriminate on the basis of alienage was improper. 239 U.S. at 43. *Greene* involved a claim by an individual whose previously-granted security clearance was revoked without a proper hearing. 360 U.S. at 475. In *Merritt*, the court required the plaintiff to demonstrate a reasonable expectation of continued employment based upon state law, rules or regulations. 827 F.2d at 1371.

latter part of that year when the approval or the approval of the technicalities wasn't forthcoming.") (Exhibit M.)

In any event, plaintiff has not come forward with any evidence that the state regulators approved the March 18th agreement. The contract which governed plaintiff's employment at Pioneer was conditioned upon the approval of state and federal regulators. No such approval was ever granted. Accordingly, plaintiff cannot establish that he had a legitimate entitlement to continued employment.[11]

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[11] Plaintiff also contends that defendant Behrens lacked authority to send the May 8th letter because the letter constituted a removal. This is immaterial to the claims against defendant Behrens. The mere fact that a complaint alleges tortious conduct by a federal employee does not mean that a constitutional claim has been stated. *Paul v. Davis*, 424 U.S. 693, 699-700 (1976); *Baker v. McCollan*, 443 U.S. 137 (1979). Instead, plaintiff must satisfy each of the elements necessary to state a constitutional claim. The absence of authority to take a particular action will not elevate an otherwise unprotected interest to the level of a property right. In any event, the Court of Appeals rejected the characterization of the letter as a removal, construing it instead as a **request** to Pioneer that it seek plaintiff's resignation. 968 F.2d at 876. Moreover, in *United States v. Gaubert*, 111 S. Ct. 1267, 1279 (1991), the Supreme Court found no merit to the assertion that because formal proceedings were not instituted against an insured institution, regulators had no discretion to take informal action. The Court explained that it has long upheld the authority of regulators to use "the power of persuasion," *id.* at 1279, to accomplish their goals through informal rather than formal means, even where the supervisory mechanism employed "is not specifically set forth in statute or regulation." *Id.* at 1277.

3. Plaintiff Does Not Have A Substantive Due Process Claim

Plaintiff questions defendant Behrens' purpose in sending the letter. The Court of Appeals, however, explicitly found that Mr. Behrens wrote the letter to ensure that "the management of newly chartered federal savings and loan institutions was entrusted to competent, reliable, and trustworthy individuals." 968 F.2d at 877. In any event, plaintiff has no substantive due process claim because "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver,* 114 S. Ct. 807, 813 (1994) (quoting *Graham v. Connor,* 490 U.S. 386, 395 (1989). Here, plaintiff has raised procedural due process claims based upon the alleged deprivation of liberty and property interests. Hence, his claims are properly evaluated under the explicit textual provisions of the Fifth Amendment rather than the more generalized substantive due process standard.

3. Defendant Behrens Is Entitled to Qualified Immunity

Plaintiff maintains that *Greene,* 360 U.S. 474, and *Endler v. Schutzbank,* 68 Cal. 2d 162 (1968), establish that defendant Behrens violated clearly-established law. As previously set forth, *Greene* is not on point and cannot serve as "established" law applicable to the conduct challenged in this case. Similarly, plaintiff's reliance on *Endler*

is misplaced because it is a state case.[12] More fundamentally, plaintiff has not stated a violation of any constitutional right, let alone one that is clearly established. Thus, defendant Behrens is entitled to qualified immunity. *Siegert*, 111 S. Ct. at 1793.

4. Special Factors Counsel Hesitation In Implying a Bivens Remedy

Plaintiff asserts that the remedy provided by the Administrative Procedure Act (APA) for courts of appeals to set aside unconstitutional agency action is not a special factor counselling hesitation because "Pelletier was never afforded any rights under the APA, and Behrens never proceeded pursuant to it." Plaintiff's Opposition at 9. He claims that defendant Behrens did not act pursuant to 12 U.S.C. § 1726(c) or 12 C.F.R. § 571.6 and that therefore the APA does not apply. This argument misses the mark. Defendant Behrens has always maintained that § 1726 (c) and § 571.6 provided the basis for his actions. Although plaintiff asserts that defendant Behrens did not act pursuant to these provisions, what plaintiff is really arguing is that the regulatory scheme could not **authorize** the FSLIC or the FHLBB to impose or enforce a condition of regulatory approval upon plaintiff because to do so would be violative of his constitutional rights. The point of *Sky Ad, Inc. v. McClure*, 951 F.2d 1146 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 58 (1992), however, is that a plaintiff

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[12] The Supreme Court has rejected the notion that federal courts should look to state decisions for ultimate guidance on constitutional principles. *See Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

may not circumvent the remedial scheme put in place by Congress to address allegedly unconstitutional agency action by bringing a separate action for damages against an individual employee. Yet, that is precisely what plaintiff seeks to do by his suit against defendant Behrens. The responsibility for failing to seek the remedy permitted by Congress cannot be laid at defendant Behrens' feet. Plaintiff could have made such a claim but did not. Under these circumstances a court-fashioned remedy based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), may not be implied.

The comprehensive remedial scheme created by Congress to give the FSLIC and the FHLBB broad authority over the ownership, operation and management of insured institutions is also a special factor counselling hesitation. Plaintiff asserts that this statutory scheme, and in particular 12 U.S.C. § 1726(c), did not permit the defendants to act as they did. However, that Congress provided for remedies in similar contexts but failed to do so with respect to the regulation of insurance of accounts demonstrates the Congressional intention that no remedy be available for claims such as plaintiff's. To allow a constitutional tort action to proceed under these circumstances would be to flout the will of Congress. Accordingly, special factors counsel against the implication of a constitutional tort remedy against defendant Behrens.

CONCLUSION

For the reasons stated above, as well as in the memorandum in support of defendant Behrens' motion for summary judgment and his statement of uncontroverted

facts, there are no genuine issues of material fact, and defendant Behrens is entitled to summary judgment as a matter of law.

Respectfully submitted,

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United States Attorney

ROGER E. WEST
Assistant U.S. Attorney

Local Counsel

FRANK W. HUNGER
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[Certificate Of Service Omitted In Printing]

[Exhibits Omitted In Printing]

PLAINTIFF'S APPLICATION TO CERTIFY APPEAL AS FRIVOLOUS, EOD NOVEMBER 1, 1994

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. JOHN W. BEHRENS, et al., Defendants.	CASE NO. CV 89-0969-RMT (Tx) EX PARE APPLICATION OF PLAINTIFF ROBERT J. PELLETIER FOR ORDER STRIKING PURPORTED NOTICE OF APPEAL AND EX PARTE APPLICATION OF CHRISTINE A. MURPHY AS VIOLATING LOCAL RULE 2 AND FOR AN ORDER CERTIFYING ANY SUCH PURPORTED APPEAL AS FRIVOLOUS

) AND AS VIOLATING THE
) MANDATE OF THE
) NINTH CIRCUIT COURT
) OF APPEALS; MEMORAN-
) DUM OF POINTS AND
) AUTHORITIES AND DEC-
) LARATION OF SAMUEL T.
) REES
) Date: November 1, 1994
) Time: Submitted
) Ctrm: 22
) Pretrial: December 5, 1994
) Trial: January 10, 1995

TO THIS HONORABLE COURT:

Plaintiff ROBERT J. PELLETIER ("Pelletier") applies ex parte for the following alternative relief against Defendant JOHN W. BEHRENS ("Behrens"):

1. For an Order striking the purported Notice of Appeal and Ex Parte Application to Vacate October 27, 1994, Order on the grounds that both such documents are purportedly signed by a person (Lenard G. Weiss and Christine A. Murphy) who is not the attorney of record for the party (Behrens) on whose behalf they are purportedly filed; and

2. For an Order certifying the purported interlocutory appeal of Behrens from this Court's Order entered on September 7, 1994, as frivolous in light of the mandate of the United States Court of Appeals for the Ninth Circuit as set forth in *Pelletier vs. Federal Home Loan* (9th Cir. 1992) 968 F.2d 865.

This Application is made on the following grounds:

Striking Unauthorized Pleadings

Apparently, a Notice of Appeal was filed in this action on October 24, 1994. The document purportedly bears the signature of Lenard G. Weiss. In addition, Pelletier understands that Christine A. Murphy has also signed and caused to be filed an ex parte application and supporting declaration seeking to vacate this Court's October 27, 1994, order. In her declaration, Ms. Murphy states that she is a member of the bar of this Court. Neither Mr. Weiss nor Ms. Murphy, however, are counsel of record for Behrens in this action. Andrea McCarthy of the Department of Justice is Behrens' counsel of record in this action and Ms. McCarthy has not filed any Notice of Appeal or ex parte application on Behrens' behalf.

Local Rule § 2.8.2.2 provides that if Mr. Weiss or Ms. Murphy desire to replace Ms. McCarthy as Behrens' attorney in this action, they must file a written substitution of attorney form signed by Behrens and his attorneys. No such document is believed to have been filed in this action and until such a document is filed, neither Mr. Weiss nor Ms. Murphy have any authority to sign pleadings on behalf of Behrens.

Certifying Appeal as Frivolous

On June 29, 1992, the United States Court of Appeals for the Ninth Circuit issued its unanimous opinion in appeal Nos. 89-56265 and 92-55023, a copy of which is attached as Exhibit A to the attached declaration of Samuel T. Rees. In 1989, Behrens had appealed from this Court's denial of his motion to dismiss on the grounds of qualified immunity and the denial of his alternative

motion for summary judgment. The Ninth Circuit noted that "government defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decision" and that Pelletier's contention that repeated interlocutory appeals are used by governmental defendants "as delaying tactics". The Ninth Circuit then held that an official defendant "may not demand repeated appellate consideration of a claim of qualified immunity" and that "[o]ne such interlocutory appeal is all that a government official is entitled to and all that we will entertain." *Pelletier* at 870-871. As a result, the Ninth Circuit refused to consider the first denial of summary judgment. Behrens had his one interlocutory appeal on qualified immunity and the Ninth Circuit's mandate is clear that he is entitled to no further interlocutory appeals on that issue.

By Petition of Panel Rehearing, served August 11, 1992, Behrens sought to have the Ninth Circuit delete from its opinion that portion which limited him to one interlocutory appeal. See Petition at pages 8-10, a copy of this application is attached as Exhibit B to the accompanying declaration of Samuel T. Rees. By Order, filed September 24, 1993, the Ninth Circuit unanimously denied Behrens' Petition. A copy of this Order is attached as Exhibit C to the accompanying declaration of Samuel T. Rees.

To the extent that it is not already a part of the record in this Action, Pelletier requests that this Court take judicial notice of Exhibits A, B and C to the Rees declaration.

A certified copy of the opinion of the Ninth Circuit as transmitted to this Court and the mandate of the Ninth Circuit was spread on the record of this action. As a result, this holding is not only the law in the Ninth Circuit, it is the law of the case in this action. As such, this mandate renders any attempt by Behrens to appeal at this juncture from this Court's September 7, 1994, order a frivolous act.

The Ninth Circuit has held that a defective notice of appeal may be ignored by the District Court and does not divest the district Court of jurisdiction. *Ruby v. Secretary of the United States Navy* (9th Cir. 1966) 365 F.2d 385, 388-389. More to the point is the Ninth Circuit's holding in *Chuman v. Wright* (9th Cir. 1992) 960 F.2d 104, 105 that if the District Court finds "that the defendants' claim of qualified immunity is frivolous or has been waived, the district court may certify, in writing, that the defendants have forfeited their right to pretrial appeal, and may proceed with trial."

Pelletier submits that in light of the mandate of the Ninth Circuit in this action, any further pretrial appeals by Behrens are frivolous as a matter of law and a certificate to that effect should be issued.

Pelletier reserves the right to seek appropriate monetary sanctions from Behrens, his counsel and Ms. Murphy at a later date.

On October 31, 1994, Plaintiff's counsel advised Defendants' counsel of Plaintiff's intention to present the instant Application *ex parte*. On November 1, 1994, a copy of this application and supporting papers was faxed to

Defendants' counsel with a courtesy copy faxed to Ms. Murphy.

Respectfully submitted,

DATED: November 1, 1994

SAMUEL T. REES
MICHAEL J. WHITE
DAAR & NEWMAN

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for
ROBERT J. PELLETIER

MEMORANDUM OF POINTS AND AUTHORITIES

This memorandum is submitted by Plaintiff ROBERT J. PELLETIER ("Pelletier") in support of his *ex parte* application.

In an apparent last ditch effort to delay the trial of this action, two lawyers not previously involved in this action and purporting to act on behalf of Behrens have sought to disrupt the pretrial proceedings and the trial by filing a frivolous Notice of Appeal and an equally frivolous ex parte application in violation of the mandate in this action of the United States Court of Appeal for the Ninth Circuit and the Local Rules of this Court.

The Ninth Circuit has held in a case which is the law of the case in this action that Behrens has only "one bite of the apple" insofar as interlocutory appeals is concerned. He took that one bite when he appealed from the denial of his motion to dismiss. The Court, as a result of the one bite rule, refused to consider the 1989, denial of

Behrens' summary judgment motion. Similarly, it is anticipated that the Ninth Circuit will dismiss any new interlocutory appeal from the September 7, 1994, order for the same reason.

This Court has two different grounds for ignoring the delaying tactics. It may treat both the Notice of Appeal and ex parte application as unauthorized pleadings since they are neither signed by Behrens or his counsel of record. It may also certify the appeal as frivolous.

The fact that the purported appeal is frivolous is demonstrated by the Ninth Circuit's opinion in *Pelletier vs. Federal Home Loan* (9th Cir. 1992) 968 F.2d 865, 870-871 as well as the Court's denial of the petition for rehearing on the issue of multiple interlocutory appeals. The fact that a waiver exists comes from the tactical decision of Behrens to appeal the motion to dismiss.

While this Court may simply be authorized to ignore the Notice of Appeal, Pelletier submits that a certification as required by *Chuman, supra* is appropriate under the circumstances and resolves the issue at this level definitively.

For the foregoing reasons, Pelletier respectfully requests that this Court grant this application expeditiously.

DATED: November 1, 1994

SAMUEL T. REES
MICHAEL J. WHITE
DAAR & NEWMAN

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for
ROBERT J. PELLETIER

[Declaration Of Samuel T. Rees Omitted In Printing]

[Exhibits Omitted In Printing]

DEFENDANT'S OPPOSITION TO APPLICATION, EOD NOVEMBER 3, 1994

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, v. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	NO. CV 89-0969-RMT (Tx) OPPOSITION OF JOHN W. BEHRENS TO PLAINTIFF'S EX PARTE APPLICATION TO STRIKE, AND REPLY TO PLAINTIFF'S OPPOSITION TO BEHRENS' EX PARTE APPLICATION FOR ORDER VACATING OCTOBER 27, 1994 ORDER Date: N/A Time: N/A Place: Courtroom 22 Pretrial: Dec. 5, 1994 Trial: Jan. 10, 1995 (Filed Nov. 3, 1994)

Plaintiff has applied for an order striking defendant John W. Behrens' October 24, 1994 Notice of Appeal from the Court's summary judgment order denying qualified immunity, and also striking Behrens' ex parte application to vacate a Rule 9 order entered three days after trial proceedings were automatically stayed by the Notice of Appeal. The ground plaintiff offers for striking the Behrens pleadings – that they were not signed by Behrens' trial counsel Andrea McCarthy – has no support in law or the Local Rules.

No Rule Prevents Behrens' Appellate Counsel From Acting For Behrens As Associate Counsel

Behrens is filing, contemporaneously with this Opposition, an Association of Counsel formally giving notice of an association previously described in Behrens' November 1, 1994 Ex Parte Application on the Local Rule 9 order, and the supporting Declaration attached to it. As the earlier pleadings clearly state, Behrens is being represented by two sets of counsel, Ms. McCarthy in connection with trial and trial-related activities; and the Steefel firm in connection with his appeal and the stay created by the Notice of Appeal. (See Nov. 1 Ex Parte Application, pp. 1-2; Association of Counsel and Declaration, filed herewith.) This Court's Local Rule 2, § 2.8.2.2, requires that a *substitution* of attorneys be effected by filing "a written substitution of attorney signed by the party and the attorneys." No substitution has occurred or will occur in this case. (November 2, 1994 Murphy Declaration, and letter of Andrea W. McCarthy attached thereto as Exhibit 1.) There is no similar requirement in Rule 2, or

elsewhere in the Local Rules, relating to an *association* of attorneys.

The California Supreme Court has addressed this same issue in the context of a State Statute which, like Local Rule 2, prohibits unwritten substitutions of counsel but says nothing about associations (Cal. Code Civ. Proc. § 284). The Court specifically held that "association of counsel is proper and need not be effected formally." *Vaughn v. State Bar*, 9 Cal.3d 698, 701-02, 108 Cal.Rptr. 806 (1973); see also *Wells Fargo & Co. v. City Etc. of S.F.*, 25 Cal.2d 37, 42-43 (1944) (no written or filed document is necessary to permit attorney associated with party's counsel of record to appear and request relief on party's behalf); *Johnston, Baker & Palmer v. Record Machine & Tool Co.*, 183 Cal.App.2d 200, 206, 6 Cal.Rptr. 847 (1960) (attorney who appears not as substitute for counsel of record, but associated with counsel of record, may appear without any written notice on the record). Nothing in Local Rule 2 suggests that it should be interpreted differently. There is therefore no basis for striking either Behrens' Notice of Appeal or his Ex Parte Application for Order Vacating the Court's Rule 9 order merely because it was signed by an associated attorney recognized by both Mr. Behrens and his trial counsel, Ms. McCarthy.

Even if the authority of Behrens' appellate counsel to appear in this action had ever been a genuine issue, which it was not, the filing of the Association of Counsel eliminates the problem.

This Court Has No Power To Strike Behrens' Notice Of Appeal

In addition, defendant Behrens respectfully submits that the District Court has no authority to strike a notice of appeal, as plaintiff requests. Though a notice of appeal is filed in the District Court, it is filed by the authority of the Federal Rules of Appellate Procedure, not the Federal Rules of Civil Procedure or the Local Rules. Fed. R. App. Pro. 3(a). Trial court rules cannot be applied to appellate procedures. *Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991). Indeed, Appellate Rule 3 expressly provides that as long as a notice of appeal is timely filed, any other error "does not affect the validity of the appeal, but is ground only for such action as *the court of appeals* deems appropriate. . . . " Thus, the sufficiency or insufficiency of a signature on a notice of appeal is a matter that can be determined only by the Court of Appeals. *E.g., Thiem v. Hertz Corp.*, 732 F.2d 1559 (11th Cir. 1984) (appeal that is not signed at all still creates appellate jurisdiction, and cannot be rejected by district court clerk, because signature is not a jurisdictional prerequisite under the Federal Rules of Appellate Procedure). As Behrens has pointed out in his Ex Parte Application to vacate the Rule 9 order, this Court's authority in connection with the appeal is limited to making a frivolousness determination which affects its own jurisdiction, but cannot interrupt the independent jurisdiction of the Court of Appeals. *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992).

Behrens' Appeal Is Not Frivolous

Support for Behrens' contention that his appeal is not frivolous, and that plaintiff's request for such certification should be denied, has already been presented in Behrens' November 1 Ex Parte Application on the Rule 9 order. The "law of the case" argument plaintiff makes is inapposite. In the first place, law of the case is a rule of practice for courts, "not a limit to their power." *Christianson v. Colt Industries*, 486 U.S. 800, 817, 100 L.Ed.2d 811, 831 (1988); *In re PHC Associates*, 949 F.2d 585 (2d Cir. 1991). In any event, Behrens is not asking this Court to ignore the Ninth Circuit ruling in *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992). Behrens is challenging the one-appeal rule not in this Court but in the Ninth Circuit, and potentially in the Supreme Court. "Law of the case" that binds the district court is not binding on an appellate court. *Christianson, supra; In re PHC, supra.* Behrens simply asks this Court to recognize, in the context of a frivolousness determination, that when two other Circuit Courts have held that the *Pelletier* rule is wrong, Behrens has a good faith basis for taking the appeal. Indeed, if a court in the Ninth Circuit had to find a challenge to the *Pelletier* rule "frivolous" simply because it is the current Ninth Circuit rule, then presumably a court in the Sixth Circuit, where the opposite standard prevails, would be compelled to find a *Pelletier* argument "frivolous" simply because the Sixth Circuit disagrees. The bare fact that there is disagreement at the Circuit level is proof that the issue itself is significant, and that neither side of the argument can properly be deemed "frivolous." Behrens therefore respectfully

requests that plaintiff's application for a frivolous certification be denied, and that Behrens' application for an order vacating the Court's October 27, 1994 Rule 9 order be granted.

Date: November 2, 1994

STEEFEL, LEVITT & WEISS
A Professional Corporation

By /s/ Christine A. Murphy
Christine A. Murphy
Appellate Attorneys for
JOHN W. BEHRENS

[Proof Of Service Omitted In Printing]

PLAINTIFF/APPELLEE'S MOTION TO DISMISS APPEAL, EOD NOVEMBER 9, 1994

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, vs. JOHN W. BEHRENS, Defendant-Appellant.	NINTH CIRCUIT NO. CENTRAL DISTRICT NO. CV 89-0969-RMT (Tx) MOTION OF PLAINTIFF AND APPELLEE ROBERT J. PELLETIER TO DISMISS APPEAL AND FOR AN AWARD OF SANCTIONS PURSUANT TO 28 U.S.C. § 1927 AGAINST APPELLANT'S COUNSEL LENARD G. WEISS AND CHRISTINE A MURPHY; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF SAMUEL T. REES IN SUPPORT THEREOF

TO THIS HONORABLE COURT:

Plaintiff and Appellant ROBERT J. PELLETIER ("Pelletier") moves for the following relief against Defendant and Appellant JOHN W. BEHRENS ("Behrens"):

1. For an Order dismissing this appeal for lack of jurisdiction pursuant to *Pelletier vs. Federal Home Loan* (9th Cir. 1992) 968 F.2d 865.

2. For an Order awarding Pelletier sanctions of $5,000 as against Behrens' appellate counsel Lenard G. Weiss and Christine A. Murphy pursuant to 28 *U.S.C.* § 1927.

This motion is made on the following grounds:

On June 29, 1992, this Court issued its opinion in *Pelletier, supra.* In that opinion, this Court held that Behrens is only entitled to one interlocutory appeal on the issue of qualified immunity, which was exhausted by Behrens appeal from the District Court's denial of his motion to dismiss.

In response to this holding, Behrens filed with the Court his Petition of Panel Rehearing, served August 11, 1992. By that Petition, Behrens sought to have this Court delete from its opinion that portion which limited him to one interlocutory appeal. By Order, filed September 24, 1993, this Court unanimously denied Behrens' Petition.

On October 24, 1994, Behrens has noticed a third interlocutory appeal seeking to appeal from the District Court's denial of his renewed motion for summary judgment. By his Civil Appeals Docketing Statement, Behrens states that his primary issue on appeal is "[w]hether the

trial court erred in denying Appellant's motion for summary judgment on the ground of qualified immunity."

This Court's opinion in *Pelletier, supra* and the subsequent denial of Behrens' Petition for Panel Rehearing constitutes a holding in this case and in this Circuit that this Court will not "entertain" Behrens' October 24, 1994, appeal and it should be dismissed as premature.

Behrens' Civil Appeal Docketing Statement signed by Christine A. Murphy and accompanied by the Notice of Appeal signed by Lenard G. Weiss recognize the foregoing holding in *Pelletier, supra,* to the effect that the appeal violates this Court's one interlocutory appeal rule. 28 *U.S.C.* § 1927 permits the imposition of sanction against counsel who unreasonably or vexatiously multiplies the proceedings in an action. Attempting to appeal a non-appealable order in order to divest the District Court of jurisdiction to proceed with a trial scheduled for January 10, 1995, is precisely the type of misbehavior the statute was intended to punish by sanctions.

This motion is based upon the attached memorandum of points and authorities, the attached declaration of Samuel T. Rees, the exhibits thereto for which judicial notice is requested and upon such further reply memorandum and evidence as may be submitted by Pelletier.

Pelletier respectfully requests that the appeal be dismissed forthwith and that Pelletier be awarded sanctions of $5,000 against both of Behrens' counsel.

Respectfully submitted,

DATED: November 2, 1994

SAMUEL T. REES
MICHAEL J. WHITE
DAAR & NEWMAN

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for ROBERT J. PELLETIER

MEMORANDUM OF POINTS AND AUTHORITIES

This memorandum is submitted by Plaintiff and Appellee ROBERT J. PELLETIER ("Pelletier") in support of the attached motion to dismiss appeal and award sanctions against counsel.

In an apparent last ditch effort to delay the trial of this action scheduled for January 10, 1995, Defendant and Appellant JOHN W. BEHRENS ("Behrens") and two lawyers not previously involved in this action have sought to disrupt the pretrial proceedings and the trial by filing a frivolous Notice of Appeal.

On June 29, 1992, this Court issued its opinion in *Pelletier, supra.* That opinion decided two separate interlocutory appeals taken by Behrens in this action (89-56265 and 92-55023). The first of these two appeals was from the District Court's partial denial of Behrens' motion to dismiss Pelletier's Bivens Claim and the denial as premature Behrens' motion for summary judgment. Jurisdiction for this first appeal was grounded on the fact that both motions sought dismissal of the Bivens Claim on the ground of qualified immunity.

Pelletier asserted in that prior appeal that Behrens should not be allowed multiple interlocutory appeals. This Court noted that

> Pelletier's contention that a rule allowing interlocutory appeals from denials of motions to dismiss, as well as from denials of summary judgment, will encourage official defendants in civil rights cases to use such appeals as delaying tactics is not an idle one.
>
> *Pelletier* at 870.

This Court then held that "One such interlocutory appeal is all that a government official is entitled to and all that we will entertain." *Pelletier* at 871. In reaching this holding, this Court noted that the government official is entitled to make the strategic choice of whether to file an interlocutory appeal from the denial of a motion to dismiss or wait and appeal the denial of summary judgment. If he appeals the former, "he appeals at his peril." *Pelletier* at 871. Having reached this holding, this Court decided the appeal from the motion to dismiss and refused to consider the denial of the motion for summary judgment.

The foregoing holding was not ignored by Behrens. Indeed, in August, 1992, Behrens filed with the Court his Petition of Panel Rehearing, served August 11, 1992. By that Petition, Behrens sought to have this Court delete from its opinion that portion which limited him to one interlocutory appeal. See Petition at pages 8-10, a copy of this application is attached as Exhibit A to the accompanying declaration of Samuel T. Rees. By Order, filed September 24, 1993, this Court unanimously denied Behrens' Petition. A copy of this Order is attached as

Exhibit B to the accompanying declaration of Samuel T. Rees. Judicial notice of both exhibits is requested.

This Court holding has recently been reaffirmed by this Court in *Mendocino Environmental Center v. Mendocino County* (9th Cir. 1994) 14 F.3d 457, 460-461. In addition, holdings in two other circuits are to the same effect. See *Kaiter v. Town of Boxford* (1st Cir. 1988) 836 F.2d 704, 707-708 and *Abel v. Miller* (7th Cir. 1990) 904 F.2d 394.

The Court in *Abel* as did this Court in *Pelletier* noted that the interlocutory appeal process is subject to abuse by governmental defendants.

> Unless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail. * * * A single pre-trial appeal is a sound accommodation of competing interests; multiple appeals are not.
>
> *Abel* at 396.

On October 24, 1994, Behrens filed his third interlocutory notice of appeal. A true and correct copy of this notice of appeal is attached to the accompanying declaration of Samuel T. Rees as Exhibit C and judicial notice thereof is requested. The notice was signed by Lenard G. Weiss, who at the time was not the attorney of record for Behrens in the Court below and had not previously appeared on Behrens' behalf. The notice appeal purports to appeal from an interlocutory order of the District

Court entered September 7, 1994 which denied Behrens' motion for summary judgment.

By Civil Appeals Docketing Statement dated October 31, 1994, the issue on appeal was stated as seeking interlocutory review of the denial of the motion for summary judgment on the ground of qualified immunity. A true and correct copy of this Civil Appeals Docketing Statement is attached to the accompanying declaration of Samuel T. Rees as Exhibit D and judicial notice thereof is requested. The statement was signed by Christine A. Murphy, who at the time was not the attorney of record for Behrens in the Court below and had not previously appeared on Behrens' behalf.

The Civil Appeals Docketing Statement notes this Court's holding in *Pelletier, supra.* Indeed, it seeks to overturn that holding. Behrens and his counsel have chosen an inappropriate method, however, to seek further appellate review and the conduct taken has served merely to disrupt trial proceedings in the Court below.

In the Court below, a Pre-Trial Conference was set for December 5, 1994. Pursuant to Rule 9 of the *Local Rules for the Central District of California,* the parties' counsel are required to meet 40 days in advance of the Pre-Trial Conference date in order to exchange trial exhibits, witness lists and trial contentions. Two days before counsel were required to meet, Behrens noticed this appeal. Behrens' trial counsel, Andrea McCarthy of the Department of Justice, has asserted that the notice of appeal has stayed the action and that Behrens is under no obligation to comply with any of the requirements of *Local Rule* 9.

The Court below had also ordered Pelletier to make available for deposition his retained trial experts. Depositions of Pelletier's economic experts were scheduled for October 26 and 27, 1994. Following the filing of Behrens' notice of appeal, Behrens' trial counsel notified both experts that they need not appear for their depositions because the notice of appeal stayed the action.

Finally, Behrens has filed in the Court below an ex parte application seeking to have the Court vacate an order filed on October 27, 1994, on the grounds that such order is contrary to the stay of this action created by the filing of the notice of appeal.

In sum, Behrens and his counsel have taken an entirely unauthorized action of noticing a third interlocutory appeal and then have used that misconduct to disrupt all proceedings in the Court below. Sanctions against Behrens' counsel are appropriate under the circumstances.

For the foregoing reasons, it is respectfully requested that the motion be granted as prayed.

DATED: November 2, 1994

SAMUEL T. REES
MICHAEL J. WHITE
DAAR & NEWMAN

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for ROBERT J. PELLETIER

DECLARATION OF SAMUEL T. REES

I, Samuel T. Rees, declare:

1. I am an attorney at law duly licensed to practice before this Court and in the Court below. I am one of the attorneys of record for Robert J. Pelletier.

2. By Petition of Panel Rehearing, served August 11, 1992, Behrens sought to have this Court delete from its opinion in *Pelletier v. Federal Home Loan* (9th Cir. 1992) 968 F.2d 865 that portion which limited him to one interlocutory appeal. A true and correct copy of this Petition is attached as Exhibit A hereto and judicial notice thereof is requested.

3. By Order, filed September 24, 1993, this Court unanimously denied Behrens' Petition. A true and correct copy of this Order is attached hereto as Exhibit B and judicial notice thereof is requested.

4. On October 24, 1994, Behrens filed his third interlocutory notice of appeal. A true and correct copy of this notice of appeal is attached hereto as Exhibit C and judicial notice thereof is requested. The notice was signed by Lenard G. Weiss, who at the time was not the attorney of record for Behrens in the Court below and had not previously appeared on Behrens' behalf.

5. By Civil Appeals Docketing Statement dated October 31, 1994, the issue on appeal was stated as seeking interlocutory review of the denial of the motion for summary judgment on the ground of qualified immunity. A true and correct copy of this Civil Appeals Docketing Statement is attached hereto as Exhibit D and judicial notice thereof is requested. The statement was signed by

Christine A. Murphy, who at the time was not the attorney of record for Behrens in the Court below and had not previously appeared on Behrens' behalf.

6. In the Court below, a Pre-Trial Conference was set for December 5, 1994 and a trial was set for January 10, 1995. Pursuant to Rule 9 of the *Local Rules for the Central District of California*, the parties' counsel are required to meet 40 days in advance of the Pre-Trial Conference date in order to exchange trial exhibits, witness lists and trial contentions. I had attempted to schedule such a meeting to occur on October 25 or 26, 1994.

7. Behrens' trial counsel, Andrea McCarthy of the Department of Justice, has asserted that the notice of appeal has stayed the action and that Behrens is under no obligation to comply with any of the requirements of *Local Rule* 9 while the appeal is pending.

8. The Court below had also ordered Pelletier to make available for deposition his retained trial experts. Depositions of Pelletier's economic experts were scheduled for October 26 and 27, 1994. Following the filing of Behrens' notice of appeal, Behrens' trial counsel notified both experts that they need not appear for their depositions because the notice of appeal stayed the action.

9. Behrens has filed in the Court below an ex parte application seeking to have the Court vacate an order filed on October 27, 1994, on the grounds that such order is contrary to the stay of this action created by the filing of the notice of appeal.

10. I have spent in excess of 23 hours of unnecessary time as a result the filing of the notice of appeal. I

have spent time researching and drafting opposition to two ex parte applications filed by the defendants and essentially seeking to delay the proceedings in the Court below because of the notice of appeal. I have spent additional time researching and drafting an ex parte application seeking to strike the notice of appeal and certify the appeal as frivolous and/or waived in the Court below. I have spent time researching and drafting this motion. I have spent time preparing for the deposition of Pelletier's economic expert, Peter Formuzis, which was unilaterally cancelled by Ms. McCarthy's communication to him. I have spent time reviewing and researching the papers filed in the Court below by the defendants. I have spent time on telephone calls and letters to and from defense counsel and experts. My normal hourly rate is $225. The reasonable value of the time expended exceeds $5,000.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 2, 1994, at Los Angeles, California.

/s/ Samuel T. Rees
SAMUEL T. REES

[Exhibits Omitted In Printing]

DEFENDANT/APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL, EOD NOVEMBER 14, 1994

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THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff, v. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	NO. 94-56507 Dist. Court No. CV 890969-RMT (Tx) Central District of California

APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL

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INTRODUCTION

Appellant John W. Behrens appeals an order of the district court denying without opinion his motion for summary judgment, on the ground of qualified immunity, on Appellee's constitutional tort claims. Appellee has moved to dismiss the appeal because in November 1989 Appellant took a prior interlocutory immunity appeal as to some of the claims. That appeal produced a published decision, *Pelletier v. Federal Home Loan Bank of San Francisco ("Pelletier I")*, 968 F. 2d 865 (9th Cir. 1992), in which the appellate panel took the opportunity to announce a new rule governing interlocutory immunity appeals in the Ninth Circuit: The Court would entertain only one pre-trial appeal on immunity issues. The one-appeal ruling was made *sua sponte*, without briefing or discussion at oral argument. In a footnote in the same opinion, the panel observed briefly that the district court had applied the wrong statute of limitations when it dismissed other claims against Appellant as time barred. Those claims, defunct when Appellant Behrens initiated his immunity appeal, were not included in the appeal or before the Court. Thus, in dictum the panel effectively directed reinstatement of the dismissed claims while at the same time declaring them, in dictum, prospectively appeal-proof under the new rule. It then declined to consider any immunity defense relating to those claims because they were not part of the *Pelletier I* appeal.

Appellee argues on the authority of *Pelletier I* that this appeal, which includes the revived claims omitted from the prior appeal, should be dismissed as frivolous and outside the jurisdiction of the Court of Appeals. The appeal, however, is both cognizable and meritorious. The

one-appeal rule announced in *Pelletier I* has no preclusive "law of the case" force here, nor should the rule be independently applied to bar this appeal. Appellant respectfully contends that the Ninth Circuit's prohibition against a second interlocutory immunity appeal is directly contrary to the Supreme Court's holding in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which was itself a "second appeal" case. Even if the rule were a valid one, however, invoking it here constitutes a retroactive application that would deprive Appellant not just of procedural but of substantive rights. Such an application violates the Ninth Circuit's own retroactivity guidelines and, given the unique history of this case, effects a grossly inequitable result.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1988 Appellee sued the Federal Home Loan Bank of San Francisco and its employee John Behrens, who also functioned as a savings and loan supervisory agent under the direction of FSLIC and the Federal Home Loan Bank Board. The factual history of the case is related in some detail in *Pelletier I*. 968 F.2d at 867-69. As the *Pelletier I* panel noted, Appellee's constitutional tort (or *"Bivens"* claims against Appellant fell into two analytically distinct groups: one set was based on a May 1986 letter written by Appellant, which resulted in termination of Appellee's employment; the other involved "nebulous theories of conspiracy" to prevent Appellee from obtaining other employment in the savings and loan industry. 968 F.2d at 868, 872. The district court dismissed the first set of claims on statute of limitations grounds. 968 F.2d at 869.

Appellant moved to dismiss the remaining *Bivens* claims, asserting a qualified immunity defense, and the district court denied the motion. That order denying the motion to dismiss was the subject of the 1989 *Pelletier I* appeal. 986 F.2d at 869.[1]

In *Pelletier I*, the panel acknowledged the right of a *Bivens* defendant, under the Supreme Court's decision in *Mitchell v. Forsyth*, to take an interlocutory appeal from a denial of immunity at the motion to dismiss stage. The panel announced, however, that the defendant exercised that right "at his peril," because he would be deemed to have forfeited his ability to challenge any later summary judgment decision on an immunity issue. 968 F.2d at 871. Having proclaimed the one-appeal rule, the Court paused briefly to resurrect the letter-based *Bivens* claims previously dismissed as time barred. 968 F.2d at 869 n.6. It then reviewed the claims actually on appeal: Appellant's conspiracy-based *Bivens* claims. The Court concluded that

---

[1] Appellee repeatedly refers to this appeal as a "third appeal." Appellee's Motion to Dismiss, pp. 2, 3, 4. That description is misleading. In 1898, Behrens appealed both the denial of immunity, and the denial of his motion under the Federal Employees' Liability Reform and Tort Compensation Act to substitute the United States as the proper defendant on Appellee's common law tort claims. The *Pelletier* panel remanded the non-immunity FELRTCA issue for clarification of the trial court ruling, suspending the entire appeal in the interim. In 1991, when the district court had completed the remand directives, Behrens filed a precautionary second notice of appeal. However, the FELRTCA issue was simply reconsolidated with the still-pending immunity issue, and the two were disposed of – as they had originally been filed – in one proceeding. *Pelletier*, 968 F.2d at 869.

while Appellant's allegations "would be insufficient to survive a motion for summary judgment" even under the relaxed evidentiary standard applied to *Bivens* claims, they were adequate for pleading purposes. 968 F.2d at 872. Thus, after the *Pelletier* decision, Appellant found himself (i) potentially bound by a "strategic choice" he had never wittingly made, and (ii) facing liability on claims that had not existed when he appealed, but (iii) deemed to have waived appellate review of those claims.

In September 1994, without oral argument or opinion, the district court denied Appellant's motion for summary judgment on qualified immunity grounds as to all remaining claims against him. The portion of the order dealing with Appellant's summary judgment motion states *in full:*

> 6. Material issues of fact remain as to defendant Behrens on the *Bivens* claims.
>
> . . .
>
> 8. Motion by defendant Behrens for summary judgment is denied as to the *Bivens* claims.

(September 8, 1994 Order, attached to Declaration of Christine A. Murphy as Exhibit A.) The order gives no indication as to whether or how the district court dealt with the threshold legal issues this Court and the Supreme Court have said must be resolved before a factual dispute on an immunity defense can be sent to the jury; nor does it identify any of the disputed material facts the court found.

II. BASIS FOR THE PRESENT APPEAL

Appellant seeks to pursue this appeal before a merits panel because he is entitled to the qualified immunity that will protect him from trial, and the district court should have granted his summary judgment motion on clear issues of law. The Ninth Circuit has held unequivocally that no immunity defense may go to a jury for resolution of disputed facts until at least two issues are determined as a matter of law: (i) whether the law governing the federal employee's conduct was "clearly established" at the time of the alleged violation; and if so (ii) whether, in light of that law, a reasonable federal employee in the defendant's position could have believed the conduct in question was lawful. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). The objective reasonableness of the defendant's conduct is itself a legal question which may not be referred to a jury. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 537 (1991); *Act Up!/ Portland*, 988 F.2d at 873. The defendant's actual beliefs and motives are irrelevant if the conduct in question passes the objective reasonableness test. *Id.*

As Appellant will show in his brief on the merits, the appeal is substantively valid. With respect to Appellee's collection of conspiracy-based claims, the panel in *Pelletier I* appears to have determined that applicable law was indeed established. *Pelletier*, 968 F.2d at 872. However, Appellant Behrens contends that at this point in the case, after all factual discovery has been completed, Appellee has come forward with no facts whatever to flesh out the "nebulous theories of conspiracy" which *Pelletier* described as acceptable pleading but "insufficient

to survive a motion for summary judgment." *Id.* As for the resurrected letter-based claims, the *Pelletier* panel itself observed that as of 1992, six years after Appellant wrote the letter declining to approve Appellee's employment, the Ninth Circuit still had not settled whether a person in Appellee's position had any constitutionally protected employment interest which could be impaired by such a letter. 968 F.2d at 871. Absence of clearly established law at the time of the alleged legal violation requires a finding of immunity as a matter of law. *Mitchell,* 472 U.S. at 534-35.

Appellant Behrens filed this appeal because the qualified immunity he is entitled to as a matter of law gives him a right "not to stand trial or face the other burdens of litigation." *Mitchell,* 472 U.S. at 526. The purpose of this appeal is simply to vindicate that right after six years of intensive, exhausting, disruptive litigation.

By order entered November 7, 1994, the district court certified this appeal as waived and frivolous, apparently on the theory that in *Pelletier I* the Court of Appeals had prospectively divested itself of jurisdiction over any subsequent Behrens appeal and is now bound by "law of the case." That is not correct.[2]

---

[2] A copy of the District Court's November 7 order is attached to the Murphy Declaration as Exhibit B. The District Court's certification has no effect on the maintenance of the appeal in this Court, nor is it pertinent to Appellee's motion to dismiss. *Langley v. Adams County, Colo.,* 987 F.2d 1473, 1477 (10th Cir. 1993). It merely permits the District Court to resume trial-level jurisdiction over the case while the appeal is pending. *Id.; Chuman v. Wright,* 960 F.2d 104, 105 (9th Cir. 1992).

III. THE ONE-APPEAL RULE OF *PELLETIER I* IS NOT "LAW OF THE CASE" ON THIS APPEAL

This Court is not bound by the *Pelletier* one-appeal pronouncement on any "law of the case" theory. In fact, "law of the case" rules have no application in this context. The doctrine can never prevent an appellate court from revisiting – and retreating from – a ruling it made on a prior appeal in the same case. "Law of the case" is merely a judicial practice, not a limitation on judicial power. *Christianson v. Colt Industries*, 486 U.S. 800, 817 (1988); *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990) ("[a]pplication of the doctrine is discretionary"). Moreover, a "significant corollary to the doctrine is that dicta have no preclusive effect." *Milgard*, 902 F.2d at 715-16 (remarks on an issue not before the court in *Milgard I* were not binding in *Milgard II*). As declared in *Pelletier*, the one-appeal rule was pure dictum. The appeal then before the Court was a first one, as the panel conceded, and the availability of future appeals was not raised by either party, nor briefed, nor discussed at oral argument. (See Petition for Panel Rehearing, Exhibit A to Appellee's Motion to Dismiss Appeal, p. 8.) Although the Court subsequently established the rule as a holding in *Nelson v. Silverman*, 999 F.2d 417 (9th Cir. 1993), its advisory meditation on the subject in *Pelletier I* cannot constitute a "law of the case" determination of Appellant's right to pursue this appeal.

Most important, however, is the Ninth Circuit's rule that " 'law of the case' is inapplicable to the question of our jurisdiction to consider an appeal." *Malone v. Avenenti*, 850 F.2d 569, 571 (9th Cir. 1988). In *Malone*, a Ninth

Circuit motions panel heard and denied appellee's motion to dismiss for lack of jurisdiction, then referred the substantive issues to a merits panel. When the appellee raised the same jurisdictional objection before the second panel, appellant insisted that the prior holding was "law of the case." The merits panel not only declined to be bound by the earlier panel's jurisdictional determination, but held flatly that it had an "independent duty" to assess jurisdiction and correct any error. *Id.* According to both *Pelletier I* and *Nelson*, this Court considers the one-appeal rule a jurisdictional matter. *Pelletier*, 968 F.2d at 867; *Nelson*, 999 F.2d at 418 ("we dismiss . . . for lack of jurisdiction"). Thus, this panel, like the merits panel in *Malone*, is vested with both the power and the obligation to determine its jurisdiction of this interlocutory immunity appeal independently of *Pelletier*.

Appellant plainly is not barred from pursuing this appeal by "law of the case" restrictions. The question is simply whether the law of the Ninth Circuit bars him. Appellant respectfully submits that it should not, and in view of contrary authority from the United States Supreme Court, it cannot.

IV. THE ONE-APPEAL RULE DIRECTLY CONFLICTS WITH THE SUPREME COURT'S HOLDING IN *MITCHELL V. FORSYTH*

In 1982, the Supreme Court examined the defense of qualified immunity in the context of two sets of competing interests: the legitimate interests of plaintiffs claiming injury from illegal acts of government officials, and the

equally legitimate right of government employees to perform their duties without fear of personal liability or the harassment of litigation. *Harlow v. Fitzgerald*, 457 U.S. 800, 807-08 (1982). The balance struck in *Harlow* produced the rule, repeatedly stressed in later Supreme Court decisions, that a claim to qualified immunity must be "resolved at the earliest possible stage of litigation": before trial, and before discovery if possible. *Harlow*, 457 U.S. at 817; *Mitchell*, 472 U.S. at 526; *Anderson v. Creighton*, 483 U.S. 635, 640 n.2, 646 n.6 (1987); *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. at 536. Three years after *Harlow*, in *Mitchell v. Forsyth*, the Court tossed a third factor on the scale – the interest of the judicial system in avoiding piecemeal appeals – and considered the result. Its conclusion, consistent with *Harlow*, was that a civil rights defendant's entitlement to full qualified immunity protection as promptly as it could be established required interlocutory review rights. The Supreme Court held that "denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets" traditional tests for treating an order as " 'final' within the meaning of § 1291," and therefore is appealable on an interlocutory basis. 472 U.S. at 527, 524. The *Mitchell* decision expressly discusses both dismissal orders and summary judgment orders, declaring them equally appealable so long as they reflect a refusal to afford immunity as a matter of law. 472 U.S. at 527-30.

The most straightforward reading of *Mitchell* is that a defendant asserting immunity may take interlocutory appeals twice, if necessary: once at the pleading stage, where the issue is whether the law governing his conduct was "clearly established"; and again at the summary

judgment stage, where facts developed on the record may demonstrate that the official's conduct was objectively reasonable, or that the plaintiff's evidence is insufficient to establish that the official actually did what plaintiff alleges. 472 U.S. at 526. Even the First Circuit, originator of the "one immunity appeal" restriction, concedes that "*Mitchell*, read literally, permits two interlocutory appeals on immunity." *Kaiter v. Town of Boxford*, 836 F.2d 704, 707 (1st Cir. 1988); see also *Zayas-Green v. Casaine*, 906 F.2d 18, 22 (1st Cir. 1990) (same). Two Circuit Courts of Appeal have construed *Mitchell* exactly that way. *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) (civil rights action involving immunity defense may give rise to "not one but two interlocutory appeals"); *Murphy v. Morris*, 849 F.2d 1101, 1104 (8th Cir. 1988) (limiting defendant to one appeal "would undercut the value of the absolute immunity defense").

The Ninth Circuit, however, has interpreted *Mitchell* – first in *Pelletier* and later in *Nelson* – as providing "several *opportunities* for immediate appeal," but only one appeal. *Pelletier*, 968 F.2d at 871; *Nelson*, 999 F.2d at 418. The reasons the Court states for the one-appeal limit, equity and judicial economy, are primarily policy considerations rather than legal reasons. Nonetheless, both *Pelletier* and *Nelson* treat the matter as a *jurisdictional* defect which bars all second appeals, without regard to any other fact. *Pelletier*, 968 F.2d at 867 ("because Behrens has not previously appealed any denial of qualified immunity, we have jurisdiction"); *Nelson*, 999 F.2d at 418 ("dismiss . . . for lack of jurisdiction").

Appellant contends that the one-appeal limitation is contrary to the Supreme Court's holding in *Mitchell* for at

least three reasons. First, because the appeal the Supreme Court heard in the *Mitchell* case was a second immunity appeal, there is no tenable argument that second appeals *as a category* are outside the jurisdiction of the appellate courts. Second, a single-appeal restriction amounts to a refusal by the Ninth Circuit to exercise its jurisdiction, which it has no discretion to do. Third, the rule is completely inconsistent with the reasoning of *Mitchell*, and indeed guts the qualified immunity defense crafted by the Supreme Court. Appellant respectfully contends that the one-appeal limit is not legally supportable, at least as an inflexible rule of jurisdiction, and should be either abrogated or amended.

A. Any Question Of Appellate Jurisdiction Over Second Immunity Appeals Was Necessarily Put To Rest By The *Mitchell* Decision Itself

The procedural posture of the *Mitchell* case in the Supreme Court establishes that second immunity appeals are not beyond the reach of federal appellate jurisdiction. The case had its origin in a civil rights suit by plaintiff Forsyth against former Attorney General John Mitchell and others, alleging illegal use of wiretaps. In 1978, Mitchell moved for summary judgment on defenses of both absolute and qualified immunity. The district court ruled that as a matter of law Mitchell was not entitled to absolute immunity, and denied summary judgment on the qualified immunity claim based on a finding of disputed facts. Mitchell appealed. *Forsyth v. Kleindienst "Forsyth I"*), 599 F.2d 1203, 1205-06 (3d Cir. 1979); see *Mitchell*, 472 U.S. at 516. The Third Circuit dismissed the appeal as to qualified immunity on the ground that it was not an

appealable order, but decided the absolute immunity issue. Concluding that the factual record was incomplete, the Court of Appeals outlined the proper absolute immunity test and remanded to the district court. *Forsyth I*, 599 F.2d at 1217. That was the first Mitchell appeal.

Back in the trial court, Mitchell filed another summary judgment motion, again asserting absolute and qualified immunity. The district court denied the motion on both issues, and granted plaintiff Forsyth's cross-motion for summary judgment on liability. *Mitchell*, 472 U.S. at 516-17. In the words of the Supreme Court: "Mitchell *again appealed*, contending that the District Court had erred in its rulings on both absolute immunity and qualified immunity." *Mitchell*, 472 U.S. at 517, emphasis added. The opinion of the Third Circuit merits panel which heard the matter begins:

> This case involves former Attorney General John N. Mitchell's *second interlocutory appeal* from a denial of both absolute and qualified immunity. . . .

Forsyth v. Kleindienst ("Forsyth III"), 729 F.2d 267, 268 (3d Cir. 1984), emphasis added. The interlocutory decision in *Forsyth III* went to the Supreme Court on writ of certiorari under the name *Mitchell v. Forsyth*. *Mitchell*, 472 U.S. at 518-19.[3]

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[3] Under federal appellate rules, *Forsyth III* was a genuine second appeal, not merely a resumption of *Forsyth I*. An appeal that follows a partial remand for additional fact determinations is a completely new appeal unless, in its remand decision, the appellate court expressly states that it is retaining jurisdiction. *Malone v. Avenenti*, 850 F.2d 569, 573 (9th Cir. 1988). The Third

Before the appeal ever reached the merits panel of the Third Circuit, however, it was referred to a motions panel for resolution of jurisdictional and stay issues. *Forsyth v. Kleindienst* ("*Forsyth II*), 700 F.2d 104 (3d Cir. 1983). Although the panel majority found jurisdiction, Judge Sloviter recorded a strong dissent, based primarily on the posture of the appeal as a second appeal. Stressing that "[o]n remand, Mitchell chose to submit no additional testimony," Judge Sloviter said flatly, "I find no precedent in *Forsyth I* for grant of interlocutory review to Mitchell *a second time* under the collateral order doctrine." *Forsyth II*, 700 F.2d at 107, 109, emphasis added.

In the Supreme Court, the majority not only noted that the appeal in question was a second one (472 U.S. at 517), they expressly called attention to Judge Sloviter's argument that it was "frivolous in light of the Third Circuit's earlier consideration of the same issue." *Mitchell*, 472 U.S. at 518 n.3. In sum, the "second appeal" issue was recognized by and squarely before the Supreme Court in *Mitchell*. Had it presented a jurisdictional impediment, the Court would have been obliged to dismiss the appeal, since its own jurisdiction depended on the Third Circuit's having held jurisdiction over the second immunity appeal:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties

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Circuit did not do that in *Forsyth I*. See 599 F.2d at 1217. Thus, the merits panel in *Forsyth III* correctly described the appeal as a second one.

> are prepared to concede it. . . . "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."

Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986), brackets in original, citations omitted. Thus, the Ninth Circuit's assertion that it lacks jurisdiction over all second immunity appeals merely because they are second appeals is simply not supportable in light of *Mitchell*.[4]

B. This Court Has No Discretion To Decline Second Immunity Appeals

The jurisdiction of the Courts of Appeals over "all final decisions" of the district courts is entirely statutory; moreover, the nondiscretionary nature of the jurisdictional grant in 28 U.S.C. § 1291 "has been construed to make the exercise of jurisdiction obligatory. Read this

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[4] The appeals the Third Circuit actually heard in *Forsyth I* and *Forsyth III* were absolute immunity appeals. That, however, provides no ground for distinguishing *Pelletier*. The heart of the *Mitchell* holding was that absolute and qualified immunity are of equal dignity and must be appealable on the same terms. Indeed, the First Circuit's one-appeal rule arose from a case involving a first appeal on absolute immunity and a second on qualified immunity. *Kaiter v. Town of Boxford*, 836 F.2d 704. Concluding that immunity is immunity, the *Kaiter* Court held that a defendant is entitled to only one *combined* immunity appeal on both defenses.

way, § 1291 confers on persons aggrieved by a final decision of the district court a *right to review* by the court of appeals." 9 Moore, *Federal Practice* (2d ed. 1994)¶ 110.05. p. 34 (emphasis added). Absent limitations imposed by other statutes, the Court of Appeals must hear appeals from all final decisions, including those decisions which qualify as final under the collateral order doctrine. The Supreme Court stated in *Mitchell* that orders denying qualified immunity are such, whether rendered on a motion to dismiss or on summary judgment. *Mitchell*, 472 U.S. at 527.

The panel in *Pelletier* did not purport to find that second immunity appeals as a group lack any essential characteristics of a collateral order. It simply stated the Court would not hear them because "the burden on civil rights plaintiffs, in terms of both delay and expense, could be considerable"; and because resolution of the "limited issue" on which immunity turns "should not require more than one judiciously timed appeal." *Pelletier*, 968 F.2d at 870, 871. Neither rationale offers any basis for a refusal to exercise jurisdiction over a final decision of the district court, and both are refuted by Supreme Court authority.

1. The Ninth Circuit May Not Readjust The Policy Balance Struck By The Supreme Court In Its Immunity Cases

The Ninth Circuit justifies its one-appeal limit with what amounts to a cost-benefit analysis. Briefly conceding the benefit of resolving immunity issues before trial, the Court emphasizes cost:

> However, these appeals also exact a price. The price consists principally of the additional expense and delay imposed on a civil rights plaintiff before his case can come to trial. In addition, such appeals interfere with the orderly progress of litigation through the trial courts and limit the ability of district judges to manage their own dockets.

Nelson, 999 F.2d at 418. The Courts of Appeals, however, may not exercise or decline jurisdiction based on equitable considerations, even in situations they consider extreme. *Christianson v. Colt Industries*, 486 U.S. 800. In *Christianson*, an appeal had bounced back and forth twice between the Federal Circuit and the Seventh Circuit, each bench insisting that it had no jurisdiction. Ultimately, the Federal Circuit, though still convinced that jurisdiction properly lay elsewhere, undertook to decide the appeal "in the interest of justice" rather than subject the hapless parties to the expense and inconvenience of yet another transfer. 486 U.S. at 806-07. The Supreme Court sympathized, acknowledged that its result was "exasperating for the litigants (and wasteful for all concerned)," but vacated the judgment and retransferred to the Seventh Circuit. Jurisdiction, it said, is not a matter of equity. 486 U.S. at 818; *cf. Federal Deposit Ins. Corp. v. Nichols*, 885 F.2d 633 (9th Cir. 1989) (district court may not decline jurisdiction to prevent unfair forum-shopping). Similarly, an appellate court may not reshape its jurisdiction to facilitate docket-control and efficiency. *E.g., Becton Dickinson & Co. v. Dist. 65, United Auto.*, 799 F.2d 57, 61 (3d Cir. 1986).

Even if a categorical refusal to hear second appeals were permissible, which it is not, there are less harsh means of ameliorating the delays and inefficiencies the

Ninth Circuit perceives as attending multiple interlocutory immunity appeals. In *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992), for example, the Court held that a district court may proceed to trial of a *Bivens* action despite a pending interlocutory appeal under appropriate circumstances. If the district judge deems the appeal waived or frivolous, he may resume trial-level jurisdiction unless and until the Court of Appeals imposes its own stay. 960 F.2d at 105. That procedure provides both the district court and appellate court with a considerable measure of control over genuinely meritless appeals.

In any event, the Supreme Court has already considered and weighed, in some detail, the competing claims of plaintiffs, defendants and the judicial system in immunity cases. Since *Harlow*, the Supreme Court's decisions have been consciously geared to "strike[ ] a balance between compensating those who have been injured by official misconduct and protecting government's ability to perform its traditional functions." *Wyatt v. Cole*, ___ U.S. ___, 112 S.Ct. 1827, 1833 (1992); *Anderson*, 483 U.S. at 638, 639. Careful consideration has been given to the negative aspects of "piecemeal appeals," including the potential burden on the courts. *E.g., Mitchell*, 472 U.S. at 518. On the whole, the balance has been struck in favor of immunity claims, as evidenced by the Supreme Court's repeated emphasis on the importance of affording defendants the benefits of the immunity defense "at the earliest possible stage in litigation." *Hunter*, 502 U.S. 224, 112 S.Ct. at 536; *Anderson*, 483 U.S. at 646 n.6. Appellant respectfully submits that this Court may not reweigh policies already ranked by the Supreme Court, nor impair the full interlocutory appeal rights that are an essential

component of the immunity equilibrium the Supreme Court has fashioned.

2. *Pelletier's* "One Legal Issue" Theory Does Not Justify A One-Appeal Limit

If the *Pelletier I* panel offered any legal rationale for the one-appeal rule, as distinct from efficiency considerations, it is that immunity appeals pose "a limited legal issue" which "should not require more than one judiciously timed appeal." *Pelletier*, 968 F.2d at 871. That is the ground on which Judge Sloviter, the dissenter on the *Forsyth II* motions panel, would have dismissed Attorney General Mitchell's second immunity appeal: "the Third Circuit's earlier consideration of the same issue." *Mitchell*, 472 U.S. at 518 n.3. Indeed, the argument had some force on the *Mitchell* facts. Mitchell, who "chose to submit no additional testimony" after his first appeal, had simply refiled the same summary judgment motion and appealed the same legal determination on the same record. *Forsyth II*, 700 F.2d at 107. The Supreme Court noted Judge Sloviter's protest, but apparently did not find the duplicative procedure a problem.

The *Mitchell* opinion also identifies at least two different questions of law that are properly reviewable by interlocutory appeal, depending on the point the case has reached in the trial court:

> [W]hether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions *or*, in cases where the district court has denied summary judgment for the defendant . . . , whether the law clearly

> proscribed the actions the defendant claims he took.

472 U.S. at 528, emphasis added; see *Act Up!/Portland*, 988 F.2d at 871 (legal disposition of immunity defense "requires a two-part analysis"). Generally, whether pertinent law as clearly established can be determined on the pleadings. Even if the defendant denies that he committed the acts plaintiff alleges, that dispute is irrelevant: the initial question is whether the acts *alleged* are a violation of clearly established law, or indeed are a constitutional violation at all. *Mitchell*, 472 U.S. at 528; *Siegert v. Gilley*, 500 U.S. 226 (1991). Thus, a defendant exercising his right to resolution at "the earliest possible stage" will move for dismissal or summary judgment on that ground, and he is entitled to have that issue properly resolved before he is forced to submit to discovery. *Anderson*, 483 U.S. at 646 n.6. According to *Mitchell*, a "clearly established law" ruling is an appropriate one for interlocutory appeal. *Mitchell*, 472 U.S. at 527-28.

The second legal question, *pertinent only if the first is resolved against the defendant*, is whether the conduct at issue was objectively reasonable under settled law and the circumstances of the case. *Hunter*, 502 U.S. 224, 112 S.Ct. at 537. That inquiry is more fact based, frequently requires some discovery, and is properly addressed on summary judgment. *Id.*; *Act Up!/Portland*, 988 F.2d at 872-73. Again, the Supreme Court has held that an interlocutory appeal is appropriate. *Hunter, supra*; see *Mitchell*, 472 U.S. at 527-78. In sum, there clearly are at least two threshold legal issues, not one, which must be resolved before a *Bivens* defendant like Appellant may be compelled to face a jury. If the defendant is to be permitted

only one appeal, an erroneous ruling on the first issue will subject him to discovery and other litigation burdens he is entitled to avoid, because caution forbids a premature appeal. See *Harlow*, 457 U.S. at 817 (right to avoid discovery is a key part of the immunity entitlement); *Mitchell*, 472 U.S. at 526 (same); *Anderson*, 483 U.S. at 646 n.6 (same). And there, quite apart from any issues of jurisdiction, lies the error of the one-appeal rule: it clashes at a very fundamental level with the concept of qualified immunity as the Supreme Court has shaped it.

C. The One-Appeal Rule Compels Bivens Defendants To Waive Rights That Immunity Exists To Protect

In *Harlow*, the Supreme Court defined qualified immunity as encompassing not merely protection against ultimate liability, but against "the costs of trial [and] the burdens of broad-reaching discovery." *Harlow*, 457 U.S. at 817-18. The interlocutory appeal right confirmed in *Mitchell* was based squarely on that explication of the nature and function of immunity. A pre-trial order denying immunity is final and appealable precisely because it "conclusively determines the defendant's claim of right not to *stand trial*," or his right to avoid "even such pretrial matters as discovery." *Mitchell*, 472 U.S. at 526, 527. Though a post-trial appeal can protect against unwarranted liability, a mistaken dismissal or summary judgment ruling will destroy trial and pretrial immunity irretrievably if interlocutory review is unavailable. *Mitchell*, 472 U.S. at 525-27. In short, "the benefit conferred by qualified immunity to individual officials, is for the

most part lost as litigation proceeds past motion practice." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*, ___ U.S. ___, 113 S.Ct. 684, 688 (1993).

The primary effect of the *Pelletier* one-appeal rule is to force a *Bivens* defendant to waive part of his immunity in order to protect the rest. The Ninth Circuit candidly underscores the seriousness of the dilemma the rule creates. Despite the Supreme Court's repeated stress on early resolution of immunity claims, the *Pelletier I* panel held flatly that a defendant who loses "at the motion to dismiss stage . . . appeals at his peril." *Pelletier*, 968 F.2d at 871. A federal employee whose house and personal bank account are at stake is not likely to underrate the scope and extent of that peril. As a result, a district court can effectively force a waiver of discovery immunity simply by denying motion to dismiss or for summary judgment until after wide-ranging discovery has been completed. That is clearly improper. *Anderson*, 483 U.S. at 646 n.6. It also happens. *E.G., Gaines v. Davis*, 928 F.2d 705 (5th Cir. 1991) (court could not refuse to rule on immunity until after defendants were deposed). And in the Ninth Circuit, it is a wrong that is effectively without remedy. What prudent defendant would use his one pre-trial appeal opportunity to vindicate discovery-related rights, clear and unequivocal as the entitlement is, when the chief result is to appeal-proof a subsequent order sending him to trial? It is in fact pure sophistry to speak of a *Bivens* defendant's "several opportunities for immediate appeal" when using one opportunity automatically eliminates the others. *Pelletier*, 968 F.2d at 870.

On the authority of *Mitchell*, the Ninth Circuit is clearly wrong in its assertion that the Courts of Appeals

have no jurisdiction over second interlocutory immunity appeals as a category. Further, neither equity nor judicial economy nor the rationale of the Supreme Court's immunity cases offers any legitimate basis for the Court's declining to hear a second appeal that meets the collateral order requirements outlined in *Mitchell*. Appellant respectfully submits that the one-appeal rule should be abandoned, or at least applied in a more flexible fashion than current Ninth Circuit case law permits.

V. UNDER APPLICABLE NINTH CIRCUIT LAW, THE ONE-APPEAL RULE SHOULD NOT BE APPLIED RETROACTIVELY TO THIS APPEAL

Even if the Court adheres to its one-appeal restriction, the Ninth Circuit's own retroactivity guidelines counsel against applying the rule to dismiss this appeal. Retroactivity is a genuine issue here. The *Pelletier I* and *Nelson* opinions treat the filing of an interlocutory appeal as essentially a waiver of any future pretrial appeals; they are phrased in terms of choice, opportunity and strategic decision. Appellant Behrens, however, was afforded no choice. He had no opportunity to select a "judicious" strategy because he had no warning that the filing of his appeal in November 1989 would have any implications for future appeal rights. *The Pelletier I* panel locked Appellant into an ex post facto decision by announcing, *sua sponte*, that in the Ninth Circuit a first interlocutory appeal was also a last interlocutory appeal. It then compounded Appellant's predicament by volunteering in a footnote an observation on the statute of limitations applicable to a set of *Bivens* claims that had been dismissed by the district court, were not on appeal, and

played no part in any strategy considerations leading to the appeal. *Pelletier*, 968 F.2d at 869 n.6. Those claims, revived as result of the panel's comment, are now the core of the lawsuit. Ironically, the dismissed claims were resurrected on the authority of a Ninth Circuit decision which held it unfair and inequitable to apply a statute of limitations decision retroactively. *Id., citing Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991).

The *Van Strum* decision outlines three tests for retroactive application of Court of Appeals decision:

> (1) whether the decision establishes a new principle of law; (2) whether retroactive application will further or retard the purposes of the rule in question; and (3) whether applying the new decision will produce substantial inequitable results.

Van Strum, 940 F.2d at 410, *citing Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). By those standards, the one-appeal rule should not be applied to bar this appeal.

First, the panel's opinion in *Pelletier I* plainly announced a new limitation that did not previously exist in the Ninth Circuit or indeed anywhere except the First Circuit. As of November 1989, the available authority on the number of permissible interlocutory immunity appeals consisted of *Mitchell v. Forsyth*, which itself involved a second appeal; opinions from the Sixth and Eighth Circuits confirming the availability of two interlocutory appeals;[5] and a lone decision from the First

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[5] *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986); *Murphy v. Morris*, 849 F.2d 1101 (8th Cir. 1988).

Circuit which imposed a one-appeal limitation while candidly acknowledging "the argument that *Mitchell*, read literally, permits two interlocutory appeals on immunity, one from the denial of a motion to dismiss and another from the denial of a motion for summary judgment." *Kaiter*, 836 F.2d at 707. After Appellant's first appeal was filed but before it was decided, another Ninth Circuit panel, citing the Sixth Circuit's *Kennedy* opinion, indicated that it recognized a second-appeal option. *Fry v. Melaragno*, 939 F.2d 832, 835 n.5 (9th Cir. 1991). The *Pelletier* rule was therefore a genuinely new rule with enormous impact on *Bivens* defendants, and one that conflicted with existing Ninth Circuit authority at the time it was instituted.

Further, retroactive application to Appellant frustrates at least one of the purposes behind the single-appeal rule. The *Pelletier I* and *Nelson* panels plainly were motivated in large measure by a straightforward desire to reduce, in absolute terms, the number of interlocutory appeals the judicial system would have to deal with. Retroactive application obviously facilitates that result. Both panels, however, expressed an intention to insure defendants the opportunity for one meaningful, "judiciously timed" appeal that would preserve "the rule of the defense as 'an *immunity from suit* rather than a mere defense to liability.' " *Pelletier*, 968 F.2d at 871; *Nelson*, 999 F.2d at 418. If Appellant is allowed no review now on the claims the *Pelletier I* panel abruptly revived in the 1989 appeal, his immunity defense to those claims will have been reduced to a "mere liability" defense, appealable only if and after he loses at trial. Through no choice of his own, Appellant will never have had an opportunity for

pretrial appellate review of any kind on those claims. That result is contrary to the intended operation of the single-appeal rule, and also reflects the kind of grave inequity contemplated by the third prong of the *Van Strum* test for nonretroactivity. This Court ruled in *Van Strum* that it was unfair "to hold that the plaintiff 'slept on his rights' where the plaintiff had no advance notice of the change announced." *Van Strum*, 940 F.2d at 410-11. It is at least as unfair to hold that Appellant Behrens must suffer the consequences of a strategic choice he had no reason to know he was making, and of the *Pelletier I* panel's tinkering with a dismissal no party had placed before the Court.

The inequity of a retroactive appeal bar in this case is compounded by the fact that the appeal is meritorious on the law. The Pelletier I panel itself effectively acknowledged that the law governing the previously dismissed *Bivens* claims was not clearly established at the pertinent time. *Pelletier*, 968 F.2d at 871. It also observed that unless Appellee supplemented his allegations on the *Bivens* claims the Court did examine, which Appellee has been unable to do, a summary judgment motion would succeed where the pleading-based dismissal motion failed. 968 F.2d at 872. Appellant respectfully submits that under *Van Strum* principles, the one-appeal rule should not be applied retroactively to Appellant Behrens current appeal.

VI. APPELLEE'S REQUEST FOR SANCTIONS IS UNFOUNDED AND SHOULD BE DENIED

Appellee has requested sanctions against Appellant's counsel pursuant to 28 U.S.C. § 1927, apparently on the ground that the appeal is barred by Pelletier I and was taken for purposes of delay. Sanctions are not appropriate, whether under § 1927 or otherwise.

"The law of this circuit requires that imposition of costs and fees under § 1927 may be made only on a finding that the attorney acted ' "recklessly or in bad faith." ' " *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 638 (9th Cir. 1987). Even the filing of a genuinely frivolous appeal "does not of itself establish bad faith." *Id.* Here, Appellee has merely alleged, without support, that Appellant's counsel filed the appeal for purposes of delay. That is untrue and refuted by the facts. Promptly after Appellant's notice of appeal was filed, counsel filed in the district court a pleading which (i) informed the court of the notice of appeal and the stay of trial proceedings that attended it; (ii) advised the court that under *Chuman v. Wright, supra*, the district court could resume jurisdiction at the trial level by certifying the appeal as frivolous or waived; (iii) advised the court of the basis for the appeal; and (iv) requested that the court vacate an order requiring pretrial evidentiary exchanges which had been entered after the notice of appeal was of record. A copy of the pleading is attached as Exhibit C to the Murphy Declaration filed herewith. The district court did certify the appeal as frivolous and is presently requiring the parties to proceed toward trial.

Further, sanctions for a frivolous appeal should not be imposed under Rule 38 of the Federal Rules of Appellate Procedure unless the appeal is "wholly without merit." *Amwest Mortg. Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991). Counsel respectfully submits that this Opposition memorandum adequately demonstrates that the appeal is not meritless.

CONCLUSION

The Ninth Circuit's single immunity appeal rule cannot and should not be invoked to bar Appellant's pending interlocutory appeal. The order appealed from is a final determination of Appellant's right, based on qualified immunity, not to stand trial on *Bivens* claims, and is an appealable collateral order within the rule of *Mitchell v. Forsyth*. No jurisdictional limitation prevents this Court from hearing the appeal; and in any event, retroactively applying the one-appeal restriction to Appellant would both frustrate an express purposes of the rule and produce a gravely inequitable result on the facts of this case. Appellee's motion to dismiss the appeal, and for sanctions, should be denied.

Date: November 14, 1994

STEEFEL, LEVITT & WEISS
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[Proof Of Service Omitted In Printing]

PLAINTIFF/APPELLEE'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL, DATED NOVEMBER 16, 1994

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, vs. JOHN W. BEHRENS, Defendant-Appellant.	NINTH CIRCUIT NO. 94-56507 CENTRAL DISTRICT NO. CV 89-0969-RMT (Tx) REPLY MEMORANDUM OF PLAINTIFF AND APPELLEE ROBERT J. PELLETIER IN SUPPORT OF MOTION TO DISMISS APPEAL AND FOR AN AWARD OF SANCTIONS PURSUANT TO 28 U.S.C. § 1927 AGAINST APPELLANT'S COUNSEL LENARD G. WEISS AND CHRISTINE A MURPHY AND SUPPLEMENTAL DECLARATION

Plaintiff and Appellant ROBERT J. PELLETIER ("Pelletier") submits this brief reply memorandum in support of his motion to dismiss this third effort Defendant and Appellant JOHN W. BEHRENS ("Behrens") to delay the trial in the Court below by filing improper interlocutory appeals.

Behrens asserts that this is not his third trip to this Court to seek interlocutory review of the denial of his claim for qualified immunity. Contrary to the opposition, Behrens in 1989 appealed from the District Court's denial of his motion to dismiss and also from the District Court's denial of his motion for summary judgment. Both denials were contained in a single order of the District Court and were briefed and argued by Behrens in connection with Appeal No. 89-56265. When this Court held that Behrens was only entitled to one interlocutory appeal, it refused to consider the 1989 denial of his motion for summary judgment.

Behrens asserts that the "one appeal rule" is being applied retroactively as to him. This also is incorrect. As this Court's opinion in *Pelletier v. Federal Home Loan* (9th Cir. 1992) 968 F.2d 865 demonstrates, Pelletier asserted in the 1989 appeal that Behrens should not be given repeated "bites of the apple" to file interlocutory appeals and thereby deprive Pelletier of a prompt trial of his claims. This Court noted that

> Pelletier's contention that a rule allowing interlocutory appeals from denials of motions to dismiss, as well as from denials of summary judgment, will encourage official defendants in

> civil rights cases to use such appeals as delaying tactics is not an idle one.

Pelletier at 870.

Behrens was obviously aware of this issue because it was contained in the brief on appeal and argued to this Court at that time.

Behrens asserts that he has not been given an opportunity to argue that the "one appeal rule" is erroneous. This assertion is erroneous as Behrens filed a Petition for Panel Rehearing served August 11, 1992 in connection with the 1989 appeal specifically raising this issue. The denial of that Petition by unanimous Order, filed September 24, 1993, is a ruling on the merits.

Behrens asserts that the "one appeal rule" is contrary to holdings of the United States Supreme Court. However, this Court holding has recently been reaffirmed by this Court in *Mendocino Environmental Center v. Mendocino County* (9th Cir. 1994) 14 F.3d 457, 460-461, is also the law in two other circuits and has never been reversed or vacated by the Supreme Court. See *Kaiter v. Town of Boxford* (1st Cir. 1988) 836 F.2d 704, 707-708 and *Abel v. Miller* (7th Cir. 1990) 904 F.2d 394. Thus, it is the prevailing rule on the subject and has been so for six years.

Behrens asserts that new claims were asserted in the District Court which were not reviewed in his prior appeal. This is also untrue. The expansion of claims was merely to reinstate the entire claim based upon the holding of this Court that the District Court had erroneously applied the wrong statute of limitations. Moreover, the expansion was done pursuant to Behrens own stipulation

acknowledging that the District Court's order was erroneous. (A copy of this stipulation is attached hereto.) Behrens should not be permitted to stipulate to an expansion and then assert that this provides him with a new basis for a third interlocutory appeal.

The true issue before this Court is whether Pelletier's day in Court is to be delayed another two years by repeated interlocutory appeals by Behrens. This Court has held that one interlocutory appeal is enough.

> Unless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail. * * * A single pre-trial appeal is a sound accommodation of competing interests; multiple appeals are not. *Abel, supra* at 396.

Behrens suffers no real prejudice by the granting of this motion. Behrens has already had one interlocutory appeal. Behrens will be permitted to appeal the final judgment. One interlocutory appeal is legally sufficient in this case.

DATED: November 16, 1994

SAMUEL T. REES
MICHAEL J. WHITE
DAAR & NEWMAN

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for ROBERT J. PELLETIER

[Supplemental Declaration Of Samuel T. Rees Omitted In Printing]

[Exhibits Omitted In Printing]

[Proof Of Service Omitted In Printing]